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# Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia

*A Comparative Perspective*



*Edited by  
Roy Prosterman  
Tim Hanstad*

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*Edited by*  
*Roy Prosterman*  
*Tim Hanstad*

*The World Bank*  
*Washington, D.C.*

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Cover photograph: Private farmer and his wife, Orel Oblast, Russia, September 1992. By Leonard Rolfe, Jr. (Rural Development Institute).

Roy Prosterman is president and Tim Hanstad is vice president and executive director of the Rural Development Institute.

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## FOREWORD

A well-functioning land market is a cornerstone of the agricultural sector in any market economy. Its functions include making sure land and other resources are used in ways that make the maximum contribution to the economy, encouraging productivity-enhancing investments, and giving farmers a source of collateral for their credit needs. Giving farmers secure tenure rights and setting up the institutions necessary for land markets to function should clearly be a high priority in transition economies. Yet, in the formerly socialist countries in Europe and Central Asia, changes in land tenure have proceeded at varying paces and with different outcomes. In some countries, especially in the advanced transition countries in Central and Eastern Europe and the Baltics, land markets based on transactions between private agents have begun to function, although financial constraints and institutional shortcomings still limit their frequency. Because land turnover is low, consolidation of fragmented parcels occurs very slowly. This can be a problem in countries where the restitution programs resulted in fragmented small holdings, as in Hungary and Romania, or where small farms dominated the farm structure even prior to the reforms, as in Poland.

In many countries of the Former Soviet Union, governments remain sharply divided on the risks and benefits of private ownership, the role of land markets, and how to develop them. Conservative legislatures and rural constituencies opposing fully functioning land markets often argue that unrestricted purchase and sale will lead to rapid consolidation of land ownership in the hands of a few large speculators, with resulting increased landlessness of the rural population. However, the observed early dominance of leasing over purchase and sale, even where the latter is permitted, suggests that these fears are not well grounded. Excessive concentration in the short run has not been a feature of land markets where they have been allowed to function relatively freely and where land has been allocated in kind to households and individuals.

The World Bank has long been active in the Europe and Central Asia region in monitoring and evaluating land reform developments, and supporting the development of land markets. Bank efforts to date have made a significant impact in our client countries, and studies produced by the Bank have been used as impartial references on this subject by both international organizations and the countries themselves. Through this work, which has focused on specific countries and topics, it became clear that it would be useful to document more systematically and comprehensively the numerous legal and institutional barriers to land market development that are found in the region, and examine the "best practices" for eliminating them, based on the experience of other countries with well-functioning land markets.

To this end, the ECA Environmentally and Socially Sustainable Development Department, in association with the Bank's Land Policy Thematic Group, engaged the Rural Development Institute, a group of experts familiar with land markets in countries around the world and in ECA. They first identified countries in which land markets have developed and function well. Criteria for judgment included low transactions costs in selling and leasing land, small differentials in prices of comparable land in different uses, ease of use of land as collateral, ease of transfer of land among uses, and other criteria. They then identified characteristics of the legal framework that contribute to the success of land markets in these countries. Based on these characteristics, they developed a "checklist" for use in transition countries to identify obstacles to

development of land markets, taking into consideration the specific characteristics of the economies and existing legal framework in these countries. The checklist developed includes potential problems in a wide range of general areas, including land ownership, land privatization, land restitution, farm restructuring, land use regulation, transactions in land rights, mortgage, land registration, land taxation, compulsory acquisition of land, women and land, and land-related institutions (both administrative and judicial). Each of these comprises a chapter in this volume.

Although some country examples are included, this "checklist" is not intended to be a comprehensive catalog of all the land market-related issues in each country. Rather, it should be used as a guide to the potential types of issues that need to be examined in a country-specific context to diagnose problems in individual countries. In this role, I hope it will be widely used and will make a valuable contribution to land market development in Europe and Central Asia and other countries outside the region.

Kevin Cleaver  
Director  
ECSSD  
Europe and Central Asia Region  
The World Bank

## **ABSTRACT**

This report examines the legal impediments to effective land ownership and markets in the ECA countries in the former Soviet Union and Central and Eastern Europe. The report also analyzes laws on land use, land markets, and land ownership categories in countries around the world and then makes appropriate comparisons and suggestions for similar situations in ECA countries.

## ACKNOWLEDGEMENTS

The **RURAL DEVELOPMENT INSTITUTE (RDI)** is a nonprofit research and consulting organization based in Seattle, Washington and affiliated with the University of Washington School of Law. RDI has worked in 29 countries of Asia, the former Soviet Union, Europe, Latin America, and the Middle East to provide legal, policy, and operational assistance as well as special studies in the following illustrative areas: writing land tenure reform and other land legislation; designing and advocating legal frameworks which support land market development; developing procedures for reorganizing state and collective farms; designing and implementing modern effective land records; and developing laws and institutions for reallocating land and resolving land conflicts. RDI attorneys have been working in the ECA region on issues related to land reform and land market development since 1990.

## EDITORS' NOTE

Although the chapters of this report have been attributed to the primary authors responsible for their drafting, each individual chapter represents a joint effort on the part of all of the attributed authors as well as other RDI staff members.

Sections of this report providing comparative experience with rural land law issues in Italy, Germany, France and Japan have been informed by the contributions of the following rural land law experts hired by RDI as consultants to this project: Professor Danilo Agostini (Italy), Dr. Christian Grimm (Germany), Professor Isabelle Couturier (France), and Professor Isoshi Kajii (Japan).

Sections of this report providing comparative experience with rural land law issues in the Republic of Belarus have been informed by the contributions of RDI Research Assistant Aleksandr Khraputsky, Professor of Law at Belarus State University, Minsk, Belarus.

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## *Chapter 1*

# *Introduction to Agricultural Land Law Reform*

*by Tim Hanstad*

Land tenure rights constitute one of the most basic and important institutions by which social and economic relations are conditioned. This is especially true in rural areas where land relations have profound implications for agricultural productivity, environmental sustainability, and the economic and social status of rural households. During human history, changes in the social and economic system have often been accompanied by major changes in land tenure relations. The recent and dramatic shift from centrally-planned to market-based economies is a striking example of this phenomenon. Designing a framework that will promote a smooth and effective transition to agricultural land tenure relations consistent with market-oriented development poses a major challenge that involves policy and legal problems of global significance.

This report focuses on: (a) the principal issues faced by the transition economies of Eastern Europe and the Former Soviet Union (ECA countries) as they reform their laws concerning agricultural land tenure relations; and (b) the potential approaches for resolving specific problem issues. In particular, the report highlights common legal impediments to establishing land tenure relations consistent with market-oriented development in these countries; overviews the approaches that might be taken and lessons that might be learned based on agricultural land law in selected high-income, developed countries; and provides a check-list of common issues confronted, and how these might be resolved, in reforming agricultural land law of ECA countries. The report is divided into fourteen chapters of which this introductory chapter is the first. The remaining chapters are organized by subject areas relating to agricultural land issues in ECA countries, including land ownership, land privatization, land restitution, farm restructuring, land use regulation, transactions in land rights, mortgage, land registration, land taxation, compulsory acquisition of land, women and land, and land-related institutions (both administrative and judicial).<sup>1</sup>

Most chapters in this report share a common organization into four or five sections.<sup>2</sup> The first section contains a brief introduction to the chapter's land-related subject area. The second section discusses the law concerning the chapter topic in ECA countries, highlighting legal

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<sup>1</sup> The report focuses on agricultural land and does not deal extensively with issues of forest land, subsoil resources, or water.

<sup>2</sup> Chapter 13, *Land-Related Administrative Institutions* and Chapter 14, *Land-Related Judicial Institutions* follow a slightly different organization from the other chapters.

impediments and, at times, sound legal models. The third section discusses the law concerning the chapter topic in developed market economies. The examples from this section are mostly drawn from Germany, France, Italy, the United States, and Japan.<sup>3</sup> The fourth section outlines both the potential legal impediments relating to the chapter topic in ECA countries and potential solutions to be considered in addressing the legal impediment. A fifth section, present in five of the chapters, provides a checklist of issues which should be covered in any ECA country law relating to the chapter topic.<sup>4</sup>

This introductory chapter contains two sections. The first section discusses the general challenges of reforming agricultural land tenure relations, categorizing the challenges into three objectives: (a) achieving land tenure security; (b) developing a market in land rights; and (c) defining and protecting legitimate public interests in land. The second section provides background on the role of law and the legal system in reforming agricultural land tenure relations. It includes discussions of characteristics of an effective legal system, ECA legal systems from a comparative law perspective, and some general issues concerning the approach to agricultural land law reform.

## **I. Reform Challenges for Agricultural Land Tenure Relations**

The challenge of reforming the law of agricultural land tenure relations in transitional economies can be categorized into three fundamental and summary objectives: (a) achieving land tenure security for private landholders; (b) developing a market in land rights; and (c) defining and protecting remaining legitimate public interests. A brief discussion of each is warranted.

### **A. Land Tenure Security**

Secure land tenure rights are an important component of economic development and rural development in particular. Land tenure security has been defined and measured in a variety of ways. Although differing notions of land tenure rights make it difficult to develop a simple objective means of determining land tenure security, the following definition identifies several key concepts.

Land tenure security exists when an individual perceives that he or she has rights to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as the ability to reap the benefits of labor and capital invested in the land, whether in use or upon transfer to another holder.<sup>5</sup>

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<sup>3</sup> The editors selected comparator countries that: (a) were developed market economies; (b) were from different continents (Europe, North America, and Asia); (c) contained a substantial amount of agricultural land; and (d) had relatively developed and successful land markets. Because most ECA countries are European and share a civil law tradition, three of the five comparator countries chosen were European Civil Law countries (Germany, France, and Italy).

<sup>4</sup> Such lists appear in Chapter 6, *Land Use Regulation*; Chapter 8, *Mortgage*; Chapter 9, *Land Registration*; Chapter 10, *Land Taxation*; and Chapter 11, *Compulsory Acquisition*.

<sup>5</sup> Frank Place et al., *Land Tenure Security and Agricultural Performance in Africa: Overview of Research Methodology*, in *SEARCHING FOR LAND TENURE SECURITY IN AFRICA* 15, 19 (John W. Bruce & Shem E. Mught-Adholla eds., 1994).

Regardless of the land system, land tenure security can be measured based on three important criteria: (a) breadth; (b) duration; and (c) assurance.<sup>6</sup> Breadth is a measurement of the quantity and quality of the land rights held,<sup>7</sup> and may include the rights to exclusively possess land; to grow or harvest crops; to pass on to heirs; to sell land or to lease it to others; to pledge land rights as security for credit; to prevent trespass; to graze cattle; to harvest wildlife; to gather firewood; to build structures to extract mineral resources; and to use surface water.<sup>8</sup> Land tenure rights are not a single entitlement in any land system, but are multiple and varied and can be analogized to a "bundle of sticks." Breadth measures the quantity and quality of the sticks that make up the bundle.<sup>9</sup>

Duration measures the length of time for which these rights are valid. Typically the same duration applies to every stick in the bundle of rights, but this is not necessarily so.

Assurance, the third criterion, is a measurement of the certainty of the breadth and duration of the rights that are held. If an individual is said to possess land rights of a specific breadth and duration, but cannot exert or enforce those rights, they have no assurance. A land "right" that cannot be exerted or enforced is not a right at all.

Tenure security exists where an individual with rights to land possesses key rights (including at least the right to possess land, use land, and enjoy the benefits of the land) for a duration sufficiently long to recoup the full value of investments made on the land, with enough certainty to prevent outside imposition or interference. Conversely, tenure insecurity exists

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<sup>6</sup> *Id.* at 20.

<sup>7</sup> *Id.*

<sup>8</sup> Jack L. Knetsch, *Land Use: Values, Controls, and Compensation*, in *LAW AND ECONOMIC DEVELOPMENT: CASES AND MATERIALS FROM SOUTHEAST ASIA* 302 (1993).

<sup>9</sup> A.M. Honore proposed a list of eleven "standard incidents" that he claims make up private property, including the crucial rights to exclusive possession, personal use, and alienation. Honore's full list of incidents includes:

- (1) the right to exclusive possession;
- (2) the right to personal use and enjoyment;
- (3) the right to the capital value, including alienation, consumption, waste, or destruction;
- (4) the right to transmit by gift, devise, or descent;
- (5) the right to manage use by others;
- (6) the right to the income from use by others;
- (7) the right to tenure security (that is, immunity from expropriation);
- (8) the lack of any term on these rights;
- (9) residual rights on the reversion of lapsed ownership rights held by others;
- (10) the duty to refrain from using the object in ways that harm others; and
- (11) the liability to execution for the repayment of debts.

A.M. Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 112-28 (A.G. Guest ed., 1961). Honore's list is now commonly accepted by property theorists as a starting point for describing the core bundle of private property rights in Western market economies, although many theorists challenge the inclusion of one incident or another. See Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARVARD LAW REVIEW* 621, notes 188-89 and accompanying text (1998). Moreover, the limits of these individual incidents vary among Western market economies.



where an individual possesses an inadequate breadth of meaningful rights, the duration of those rights held is insufficient to recoup investments made, or the ability to exert or enforce rights is lacking.<sup>10</sup>

International experience shows that secure land rights are an essential component of economic development. Compared to weak or insecure rights, secure land rights facilitate economic development in a variety of ways, including:

1. Raising productivity through increased agricultural investment;<sup>11</sup>
2. Increasing land transactions and facilitating the transfer of land from less efficient to more efficient uses by increasing the certainty of contracts and lowering enforcement costs;
3. Reducing the incidence of land disputes through clearer definition and enforcement of rights;
4. Increasing credit use by creating greater incentives for investment, improved creditworthiness of projects, and enhanced collateral value of land;
5. Reducing soil erosion and other environmental degradation to land; and
6. Creating political stability by providing farmers a more significant stake in society.<sup>12</sup>

Secure land tenure provides the conditions necessary for landowners and land users to put their land to its highest and best use without fear of losing the land or the benefits reaped from it. Secure land tenure also contributes to sustainable management of agricultural land by encouraging landholders to make the long-term investments necessary to preserve the natural resource base.<sup>13</sup> When insecure tenure prevails, people do not make capital and labor

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<sup>10</sup> Place, *supra* note 5, at 21.

<sup>11</sup> Increased productivity results not only from increased incentives to invest, but also from distinct sources of efficiency gains related to other points of the list. For example, another source of increased efficiency arises when land rights become marketable. Land tenure security increases the marketability of land rights which leads to efficiency gains because land can be efficiently allocated to more productive users. Agricultural land markets do not generally develop if land rights are insecure. The ability to use land as collateral for loans can also increase efficiency. In this case, part or all of the risk of principal loss is shifted to the borrower, making lenders more willing to engage in lending and increasing farmers' access to capital.

Increased agricultural productivity from these efficiency gains has other important downstream effects. These include: improved nutrition; improved farm incomes; the ability of farmers, because of those improved incomes, to satisfy their desires for a wider range of consumer goods and services; and the creation of more off-farm jobs (or utilization of what would otherwise be excess production capacity) because of that increased farmer demand for goods and services.

<sup>12</sup> See GERSHON FEDER ET AL., LAND POLICIES AND AGRICULTURAL PRODUCTIVITY IN THAILAND (1988), cited in JOHN W. BRUCE & SHEM E. MIGHT-ADHOLLA, SEARCHING FOR LAND TENURE SECURITY IN AFRICA 15 (1994); see also ROY PROSTERMAN ET AL., REFORMING CHINA'S RURAL LAND SYSTEM: A FIELD REPORT 2 (Rural Development Institute Report No. 85, 1994). This increased stake and increased farmers' income also reduces the pressure for farmers to migrate prematurely to urban areas.

<sup>13</sup> WILLIAM THIESENHUSEN ET AL., LAND TENURE ISSUES IN INDONESIA 2 (March 1997) (report prepared for United States Aid for International Development, on file with Rural Development Institute).

investments necessary for improving productivity due to fears that they will be unable to protect their claims to the land.<sup>14</sup>

Finally, and not to be forgotten in the course of analyses that may proceed largely along economic lines, secure land tenure widely held by the rural population plays a vital role in empowerment, democratization, and the growth of civil society.<sup>15</sup>

## B. Land Markets

Land markets function as a powerful tool for encouraging productivity and investment among land users. Effective markets for transferring land rights for compensation provide a means to reallocate those rights to the most productive users. Land markets also provide the basis for the mortgage of rights in land, which increases access to capital that is often critically necessary for productivity-enhancing investments. Even for landholders who do not avail themselves of land markets during their lifetime, land markets identify and confirm asset value that can be passed to the next generation and can be used as a basis for planning a range of human activities

Land markets can be categorized into land sales markets and land rental markets. In theory, land sales markets are the most effective way of combining efficient transfers of rights with long-term tenure security. However, in an environment characterized by market imperfections, especially in credit and insurance markets, land rental markets are often more conducive to efficiency-enhancing transfers than land sales markets. In any case, land rental markets are likely to develop earlier and more rapidly than land sales markets. International experience indicates that efforts aimed at encouraging land rental markets that are combined with measures to reduce credit and insurance market imperfections are likely to have much greater benefits than an exclusive concentration on land sales markets.<sup>16</sup>

The effectiveness of land markets is difficult to ascertain through quantitative measurement and will depend on the unique economic, social, historical, and policy features of a particular setting. Well-functioning land markets, however, can typically be recognized by the ease of entry and the ease of performing transactions, both of which depend on availability of secure land tenure arrangements; low transaction costs; adequate land information; competition in the land market support mechanisms; and clear, simple, and enforceable legal rules for transferring land rights. Thus, land markets work well where these conditions are present in

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<sup>14</sup> Steven Hendrix, *Ownership Insecurity in Nicaragua*, in PROPERTY LAW IN LATIN AMERICA WITH RECOMMENDATIONS 940 (1993).

<sup>15</sup> See generally FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (1994).

<sup>16</sup> Gershon Feder & Klaus Deininger, *The Evolution of the World Bank's Land Policy* 3, 8-10 (unpublished paper prepared for Conference on Land Tenure, Land Markets, and Productivity in Rural China, May 15-16, 1998). This is especially likely to be true when there are numerous, small potential private lessors of agricultural land (as is the case in many ECA countries, as later discussions in this report indicate) rather than large private landlords operating from a dominant bargaining position in settings of high population pressure and land scarcity. See generally ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* 7-71 (1987).

some degree and do not work well where they are absent. Land market experts point out that it is unrealistic to look for 100 percent success, especially in early stages of land market development. The objective should be to attain some degree of performance and put in place institutions, instruments, and rules that will point land markets in the right direction and lead to increasing and continued success.<sup>17</sup>

The development of effective land markets requires at least two important categories of legal steps. First, the relevant policies, laws, and institutions must provide secure, long-term land tenure rights to a broad range of legal and physical persons. Insecure land rights will generally not be transferred. Second, the transfer of land rights must be allowed and facilitated by relevant laws, policies, and institutions.

Every developed country uses land markets as an important means to provide access to land resources, efficiently allocate land resources, and encourage productivity and investment among land users. Land markets also play a crucial role in the transformation of agriculture-based economies to industrial and service-oriented economies. As such economies develop, land markets facilitate the gradual transition of labor from agricultural to non-agricultural sectors, as those who wish to leave agriculture sell their land rights (including the value of the improvements they have made) to those who wish to remain engaged in agriculture. At the same time, land markets also facilitate changes within the agricultural sector from labor-intensity to capital-intensity, as the size of farms is gradually and voluntarily increased through purchase and consolidation. Undeveloped or heavily restricted land markets slow these processes, delaying important efficiency gains.

Efficiency gains resulting from effective land markets must, however, be balanced against competing social and environmental policy goals. As a result, all land markets are regulated to some extent. One such means of regulation is through restrictions on the ability to transfer land through sale, lease, or inheritance (see **Chapter 7, Land Transactions**). Such restrictions involve a careful balancing of efficiency and equity goals.

### **C. Defining and Protecting Public Interests**

The goals of market-oriented reform of land tenure relations in ECA countries may involve a substantial reduction of state control on land, but more fundamentally they involve a change in the system of state control. The state has an important role to play in defining, regulating, and enforcing land relations in all countries. While reforming agricultural land laws of ECA countries necessarily involves increasing the scope and nature of private rights to land, it must be recognized that important social and public interests concerning land remain and that the state will play a role in protecting those interests. State roles remain in areas such as the initial privatization and allocation of public land (see **Chapter 3, Land Privatization**), regulating the use of land (see **Chapter 6, Land Use Regulation**), land registration (see **Chapter 9, Land Registration**), land taxation (see **Chapter 10, Land Taxation**), compulsory acquisition of privately held land for public purposes (see **Chapter 11, Compulsory Acquisition**), and

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<sup>17</sup> See CATHERINE FARVACQUE & PATRICK MCAUSLAN, REFORMING URBAN LAND POLICIES AND INSTITUTIONS IN DEVELOPING COUNTRIES (World Bank Urban Management Program Policy Paper No. 5, 1992).

resolving disputes concerning land (*see Chapter 14, Land-Related Judicial Institutions*). This continuing but changed role for the state will likely involve significant institutional reform for the public administrative and judicial institutions charged with land-related roles (*see especially Chapter 13, Land-Related Administrative Institutions and Chapter 14, Land-Related Judicial Institutions*).

The area of land use regulation is a good example of how state control is likely to remain in some form, but be reduced and otherwise changed. Even in advanced market economies where secure private land rights and land markets are well established, the state has the ultimate power and responsibility of controlling land use for the public welfare. In market economies the government "controls" land tenure relations primarily in an indirect manner through stipulation and enforcement of laws and regulations, as distinct from the style of broad bureaucratic command and discretion present in many ECA countries. In advanced market economies, the state does not normally interfere with private decisions and activities because decentralized decision-making by secure, individual holders of land rights is most often efficient in achieving resource allocation and use in a manner consistent with social welfare and most often consistent with the functioning of a democracy. If ECA countries are to learn from these models and experiences of regulating land use in advanced market economies, they will not eliminate state regulation of land use, but reduce and change such regulation to complement the benefits of private land use and allocation decisions.

Perhaps the most useful general principle of reforming agricultural land law is that any change should be clearly directed to realigning incentives and restrictions so that the rules achieve an effective balance between private and public interests. The rules established and enforced by the government should motivate individuals in ways that are most consistent with the longer-term goals and values of the wider community. This necessarily involves a balancing process.

## **II. Role of Law and Legal System in Reforming Land Tenure Relations**

Any efforts to reform agricultural land tenure relations must first focus on the system of law that provides the framework for policy formulation and the vehicle for policy implementation. The role of law and the legal system is sometimes underestimated not only in reforming land tenure relations, but more generally in economic reform and development. Peruvian economist Hernando de Soto writes:

All the evidence suggests that the legal system may be the main explanation for the difference in development that exists between the industrialized countries and those . . . which are not industrialized. . . . The debate about development will therefore have to be reformulated to take the importance of the legal systems into account. We cannot continue to close our eyes to the fact that not all of a society's decisions are determined by its cultural characteristics or economic systems.<sup>18</sup>

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<sup>18</sup> HERNANDO DE SOTO, *THE OTHER PATH* (1990).

This report will focus on specific legal impediments to reforming land tenure relations in ECA countries and on the possible changes in law that could remove those impediments. Before a discussion of the specific legal impediments and possible approaches to overcoming the impediments, a broader overview of the legal system is warranted. This section of the Introduction chapter is divided into three subsections. The first will discuss broad characteristics of any legal system that will help to further market-oriented reform policies. The second will provide a broad overview of legal systems in ECA countries from a comparative law perspective. The third will highlight some general issues concerning land law reform approaches.

## **A. Characteristics of an Effective Legal System**

Effective legal systems in market economies share certain general characteristics fundamental to facilitating economic development. These include predictability; fairness; rapid adjudication; and consistency with customs, norms, and levels of economic development.

### **1. Predictability**

Predictability (or transparency) is perhaps the most important single feature for a legal system designed to induce economic growth. Economic actors must be able to predict the legal consequences of their economic activities as well as possible. A legal system that lacks the element of predictability will not adequately promote individual initiative.

If a legal system is to afford a high measure of predictability to many persons, it must include substantive and procedural rules that are written, published, and widely available. The legal system should spell out very clearly the procedure necessary for the enforcement of legally protected rights and interests. The procedural and substantive rules should also be as simple, precise, and unambiguous as possible.

### **2. Fairness**

Legal systems designed to foster economic growth should also place a heavy emphasis on the relative "fairness" of the law. To the extent possible, laws should apply equally to all regardless of public connections or private power. Moreover, both substantive and procedural laws should contain some notions of "due process" -- open and unrestricted access to public courts and administrative bodies for the airing of legal grievances and for the enforcement of legal rights.<sup>19</sup> A legal system that tolerates unequal application of legal standards or permits arbitrary exercise of power without legal recourse tends to induce passivity and resentment, neither of which is conducive to encouraging widespread and enthusiastic participation in economic activity.

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<sup>19</sup> See W. Lawrence Church, *Legal Systems*, in *INSTITUTIONS IN AGRICULTURAL DEVELOPMENT* 223-24 (Melvin G. Blase ed., 1971).

### 3. Rapid Adjudication

Rapid adjudication or formal resolution of disputes facilitates economic initiative and activity. Too many legal systems have an unfortunate propensity for long delays before official resolution of a dispute can be completed. Such long delays can be addressed by increasing the number of judges or courts to handle anticipated litigation, keeping formalized procedural rules to a minimum, establishing administrative procedures to solve some problems without time-consuming and expensive recourse to the courts, and, where practicable, encouraging private dispute resolution through prearranged mediation or arbitration. Efforts to facilitate rapid adjudication can impinge on the standards of fairness, and the appropriate balance must be sought in each unique setting. The appropriate balance is likely to include publicized and practiced rules specifically defining and limiting administrative authority and discretion.<sup>20</sup>

### 4. Consistent with Customs, Norms and Level of Development

No legal system can depart totally from the habits and traditions of the populace it serves and remain effective. A legal system must reflect, to some significant extent, the legal and social customs of the country's people or they may resent or mistrust the law. Unless the laws and the law-enforcing mechanism are considered fair, legitimate, and familiar by the people it serves, the cost of law enforcement will become prohibitively high. The legal system must also be consistent with the country's level of economic development. For example, a country's administrative resources and capability must be considered in drafting both substantive and procedural rules so that such rules can actually be implemented. These resources and capabilities differ significantly among the various ECA countries; and must be taken into account. Moreover, law must be consistent with the mode of land use and transactions actually practiced in the country. Law is both a reflection of a country's economic, social, and political fabric and a tool to reform that fabric.

## B. ECA Legal Systems from a Comparative Perspective

The world's legal systems have commonly been classified into three major legal families or traditions: civil law, common law, and socialist law.<sup>21</sup> The civil law tradition exists in most Western European countries, Latin America, countries of the Near East, large parts of Africa, Indonesia, and Japan. It is derived from ancient Roman law. Legal systems in the civil law tradition emphasize the primacy of legislation (as distinct from case law) as a source of law.

<sup>20</sup> See discussion on reforming judicial institutions in **Chapter 14, Land-Related Judicial Institutions**.

<sup>21</sup> PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 31 (1995). A legal tradition or family has been defined as a set of deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and the political ideology, and the organization and operation of a legal system. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 2 (1985). Classification of legal systems into three major traditions or families does not mean that the trichotomy encompasses every possible legal system existing in the modern world. Legal systems in many countries are hybrid or mixed systems. In numerous countries of Africa and Asia, powerful elements of customary law (of non-European origin) still remain. Moreover, the notion of legal families is not free from criticism and has been variously interpreted. Nonetheless, most comparative law experts concede that the broad classification of legal systems into families or traditions is warranted based on shared general or predominant characteristics. See De Cruz, *supra*, at 31-40.

They share a tradition of devising systematic, authoritative, and comprehensive codifications as their lawmaking style, working from the general to the particular in their method of legal reasoning.<sup>22</sup>

Common law legal systems originate from English common law concepts and exist in most countries that were part of the British Empire, including the United Kingdom, Australia, the United States, Canada, India, Pakistan, New Zealand, and large parts of Africa and Southeast Asia. Common law legal systems emphasize case-based law, founded on judicial decisions and the doctrine of judicial precedent (*stare decisis*). In modern times, case law has been heavily supplemented by legislation, which has typically taken over as the primary method of law-making. However, English law and the common law systems it generated never received Roman law in the way it was received in civil law countries. The characteristics of the case-based common law, the need to conform to the framework that had been created, and the centralized courts all helped to mold a diversity of local customs and primitive Anglo-Saxon practices into a law that was followed by the whole country or jurisdiction.<sup>23</sup>

Socialist legal systems originated from Marxist-Leninist concepts of law and exist or recently existed in the former Soviet Union, most of Eastern and Central Europe, China, Vietnam, North Korea, Mongolia, Cuba, Cambodia, Laos, Mozambique, Angola, Somalia, Libya, Ethiopia, Guinea, and Guyana.<sup>24</sup> Socialist legal systems are more similar to civil law than to common law systems in that they emphasize statutory rather than judicial law.<sup>25</sup> Socialist

<sup>22</sup> De Cruz, *supra* note 21, at 26-27. The civil law family of legal systems is often further divided into the French legal tradition and the German legal tradition. The French legal tradition is based on a rigid separation between: (a) private and criminal law which are based on codes resulting from Napoleonic codification; and (b) public or administrative law which has been elaborated and developed by the administrative courts. Each of these two categories of law within the French legal tradition have their own courts, unique legal concepts, and commentators and learned authors. The German legal tradition is based on a more dogmatic and systematic study of Roman material which has resulted in a conceptual, systematic law produced to a high level of abstraction in the German Codes which are different from the French Codes in their organization, tone, mode of expression, and extraordinary precision. *Id.*

<sup>23</sup> *Id.* at 27, 101-02.

<sup>24</sup> *Id.* at 185.

<sup>25</sup> Before Sovietization the legal systems of Central and Eastern Europe were deeply influenced by Roman civil law traditions and in particular by French, German, Austrian, Italian, and Swiss statutes and treatises. UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 203 (1997). While the majority of Western legal scholars argue that socialist law forms a family of law separate from the civil law family, some believe that socialist law is simply a member of the civil law group or sub-species of civil law. See JOHN HAZARD ET AL., *THE SOVIET LEGAL SYSTEM* (1977); MERRYMAN, *supra* note 21; SYPONWICH, *THE CONCEPT OF SOCIALIST LAW* (1990); and QUIGLEY, *Socialist Law and the Civil Law Tradition*, *AMERICAN JOURNAL OF COMPARATIVE LAW* 781 (1989). Differentiating features of socialist law from civil law include:

- (1) socialist law is programmed to wither away with the disappearance of private property and social classes and the transition to a communistic social order;
- (2) socialist countries are dominated by a single political party;
- (3) in socialist systems, law is subordinated to creation of a new economic order, wherein private law is absorbed by public law;
- (4) socialist law has a pseudo-religious character; and
- (5) socialist law is prerogative instead of normative.

*Id.*

legal systems are predicated on the principle that all law is an instrument of economic and social policy. Law in socialist legal systems is (or was) typically a mere tool in planning and organizing the economic and social structure, determined and defined in terms of its political function, and in a subordinate position to the policy of existing authorities.<sup>26</sup>

In Europe today, the Socialist legal system has fallen into terminal decline and is no longer an equal partner with civil law and common law legal families. It has been suggested that today, after complete or substantial emancipation from ideology, post-Soviet legal systems must be reclassified.<sup>27</sup> It may appear that they now should be included in the civil law family because of their pre-socialist roots in that tradition. Indeed, in recent years many post-socialist legislators have turned to pre-socialist sources of law greatly influenced by civil law traditions. However, because of the more recent influential role of Anglo-American legal principles in the private and commercial law of civil law countries and because of some lingering concepts of socialist ideology and law, the evolving systems of law in former Soviet republics and post-socialist Central and Eastern European countries may take on more hybrid characteristics and not fit neatly into a civil law tradition. The question is more than academic. When approached with an eye to law reform it takes on a practical dimension. Conscientious law reform must take into account the historical and structural realities upon which it operates. It is therefore necessary to consider whether or not former Soviet republics and Central and Eastern European countries still share a sufficiently homogeneous background to justify reform proposals aimed at the entire region. While decades of superimposition of centralized legal and economic regulation have introduced a common historical experience in these legal systems, the pre-Soviet or pre-socialist experience varied from region to region. Those different traditions, along with unique current goals, situations, and priorities are likely to result in a variety of directions and law reform choices and models for different countries.<sup>28</sup> This tension between local legal, social, political, and economic peculiarities and common structural characteristics must be taken into account when addressing law reform, including agricultural land law reform.

Transplanting law that has been developed to suit the unique conditions of another country wholesale into an ECA country or any country pursuing law reform is never a good idea.<sup>29</sup> However, ECA countries can and should learn from the experiences (both good and bad) of both civil law and common law countries, applying lessons and models in a manner most fitting for their unique conditions and goals. Civil law models may be more appropriate in many because of the pre-socialist civil law experience of most ECA countries and because the socialist legal systems from which they are emerging more closely resemble civil law systems. Common law systems and countries, however, also have appropriate and suitable models and lessons for

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<sup>26</sup> De Cruz, *supra* note 21, at 183-85.

<sup>27</sup> Mattei, *supra* note 25, at 203.

<sup>28</sup> *Id.* at 205-07.

<sup>29</sup> See Ann Seidman & Robert Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AMERICAN JOURNAL OF COMPARATIVE LAW 1, 10-13 (1996).



ECA countries and should not be ignored in the law reform process.<sup>30</sup> ECA countries should be able to take advantage of the best solutions devised by land law systems throughout the world.

### C. General Issues Concerning Approaches to Land Law Reform

#### 1. Are Land Codes Necessary?

Two patterns of land law reform are possible in most ECA countries: (a) develop a code of land law that attempts to cover the whole field of basic land relations; or (b) move forward on a piecemeal basis, passing a series of laws or decrees that cover only certain aspects of land relations. In a given country, both should be considered as viable options with the ultimate choice dependent on which approach is most apt to benefit the “consumers” -- consisting of present and would-be holders of land rights.

There are arguments for and against both approaches. A uniform land code can simplify land management, lower information costs of the legal process, and facilitate a land market by providing a systematic framework for governing land relations and analyzing land law. Codes can also reduce chances of duplication or conflicts in legislation and allow for easy identification of gaps in legal coverage.<sup>31</sup> Of course, if a land code is not (or is not intended to be) comprehensive, it loses many of these advantages.

Despite the potential advantages of a comprehensive land code, a piecemeal approach may prove more advantageous. First, a society may not be ready for a uniform code. Some areas or groups of people may find such a code too sudden a change from existing patterns of life.<sup>32</sup> Second, a country may have difficulty passing such a comprehensive law through the legislature. An all-encompassing law is likely to include numerous controversial or contentious points, any one of which can block passage of the entire legal framework.<sup>33</sup> Third, a country may find it needs some new legal framework for certain crucial issues prior to the time that a code can be enacted. A comprehensive code is likely to require a significant amount of time to develop and enact. In the meantime, the absence of legal rules governing certain land issues may become a significant impediment. Finally, it should be recognized that, even among the civil law

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<sup>30</sup> The suitability of Anglo-American models to the CIS and Eastern Europe legal reforms has been explained making recourse to several factors, including more flexibility and more independence of private law rules from public law. See Paul Rubin, *Growing a Legal System in Post-Communist Economies*, 27 CORNELL INTERNATIONAL LAW JOURNAL 1 (1994); P.H. Brietzke, *Designing the Legal Frameworks for Markets in Eastern Europe*, 7 TRANSNATIONAL LAW JOURNAL 35 (1994).

<sup>31</sup> See Steven Hendrix, *Legislative Reform of Property Ownership in Kazakhstan*, 15 DEVELOPMENT POLICY REVIEW 159, 160 (June 1997); Gianmaria Ajani & Ugo Mattei, *Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics*, 19 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 117, 123-26 (1995).

<sup>32</sup> Farvacque & McAuslan, *supra* note 17, at 54.

<sup>33</sup> For example, Russia has been attempting to pass a comprehensive land code for years, but serious disagreements between legislative factions and between the legislature and the president have prevented passage of the comprehensive code.

countries of Western Europe where many bodies of laws are codified, land codes are extremely rare.

## 2. Defining Jurisdiction over Land

Any country reforming a body of law must ultimately decide on and clearly define the relative roles of the national government and sub-national levels of government (regional and local). The basic rules allocating jurisdiction (the authority to adopt rules) over land issues are usually stated in a country's constitution. Jurisdiction over land issues can be given to the central government,<sup>34</sup> given to the regional governments, or exercised jointly between the central and regional governments.<sup>35</sup> All three models have been used successfully in developed market economies. The approach chosen will depend on the unique political and geographic circumstances of each country.

Under most approaches taken, there will also need to be resolution, through the constitution itself or authoritative means provided by the constitution, of further basic issues of preeminence and priority, including: (a) how various actions or failures to act by the executive and legislative powers at the same level of government relate to each other (e.g., if the national legislature has not acted on particular land issues, can the executive act via presidential decree or government resolution on those issues pending legislative action?); and (b) how various legal enactments adopted at the national level relate to various legal enactments adopted at the regional level (e.g., what happens if a law passed by a regional legislature contradicts a presidential decree or a national government resolution or administrative regulation?). Lack of clarity over these jurisdictional issues can lessen tenure security and impede land market development when contradictions or uncertainties exist in the legal framework.

Finally, the role and function of the judicial system (generally weak, subordinate, and heavily politicized during the Soviet era) will have to be specified in a number of important respects either through the constitution itself or by authoritative means provided by the constitution. Can the courts authoritatively declare laws to be contrary to the constitution or resolve other issues (including issues requiring constitutional interpretation) of the kinds raised in the two preceding paragraphs? Will there be a doctrine functionally similar to *stare decisis* under which courts will follow judicial precedent? The judicial branch of government can play a very important and powerful role in contributing to effective agricultural land relations, but that role must be clearly defined.

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<sup>34</sup> When rule-making authority over land issues lies with the national government, it typically is allowed to delegate such power to regional or local governments, either broadly or for specifically defined issues. In such cases, the regional governments must usually wait for national government authorization to legislate on land matters and then can only legislate within the bounds defined by the national government.

<sup>35</sup> When rule-making authority over land issues is within the joint jurisdiction of the national and regional governments, regional governments normally can pass land laws so long as they are not inconsistent with existing national law. In such cases, if the national government has not established rules on certain issues, the regional governments have more independence to enact rules on those issues.

### III. Conclusion

Designing a framework to govern and facilitate a smooth and effective transition to agricultural land tenure relations consistent with market-oriented development poses a major challenge for ECA countries. The overall challenge consists of three broad objectives: (a) achieving land tenure security; (b) developing a market in land rights; and (c) defining and protecting legitimate public interests in and over land. The role of law and the legal system is crucial in this process. The role is both general and specific. In general terms, a legal system characterized by predictability, fairness, rapid adjudication, and consistency with the country's customs, norms, and levels of economic development is likely to further overall economic development, including development of effective agricultural land tenure relations. In specific terms, law is the instrument for effectuating economic and social policy reform. General policies must be translated into the specific language of law to be implemented. If the laws contain problems, the policy outcome will be flawed. In developing the legal framework to reform agricultural land relations, ECA countries can and should learn from the experience (both good and bad) of other countries. To do so will require a massive comparative effort -- an effort to which this report hopes to contribute.

## Chapter 2

# Land Ownership

by Renée Giovarelli and Tim Hanstad

### I. Introduction

Land tenure systems can be categorized in a variety of ways, but are often categorized by forms of “ownership” into private ownership, state ownership, and group ownership.<sup>1</sup> All three forms of ownership can and typically do exist within a given country. However, in many countries, one of these three ownership systems tends to dominate. Private ownership dominates in the developed market economies, including those in Western Europe, North America, Japan, Australia, and New Zealand. State ownership, with leases or use rights and occupation rights given to private individuals or groups, is an important system of tenure in parts of Africa, Asia, and the former Soviet Union. Leaseholds are a major tenure form within both private and state ownership schemes. Group ownership systems include collective, communal and other customary forms of ownership in which the local community or representative designated by or for that community exercises ownership rights. Group ownership dominates in Africa, many parts of the South Pacific, and rural China.

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<sup>1</sup> Land systems can be categorized in other ways. Ellickson categorizes land systems not by ownership but according to the number of persons who have routine privileges to enter and use a parcel. Robert C. Ellickson, *Property in Land*, 102 YALE LAW JOURNAL 1315, 1322-26 (1993). He distinguishes among “private property” (in which no more than a small number of persons have access to a resource) and “public property” (in which more than a small number of persons have routine privileges to enter and use a parcel). Private property is further divided into individual ownership and household ownership. Public property is further divided into group property, open-access property, and horde property. Group property refers to ownership by a collective whose membership is larger than a household’s but small enough to permit intermittent face-to-face interaction. An open-access system is one in which privileges of entry are universal. Horde property is land on which entry is not unlimited, but access rights are more widespread than those given to the membership of a group. *Id.*

Others have categorized land systems into private, common, state, and non-property systems, each of which is characterized by the rights and duties assigned to different actors. In private property systems, individual private owners have the right to undertake socially acceptable uses and the duty to refrain from socially unacceptable uses. In state property systems, individuals have the duty to observe use and access rules determined by the controlling or managing agency, and that agency (or agencies) has the right to determine use and access rules. In common property systems, the management group (“owners”) has the right to exclude non-members, and individual members of the management group (“co-owners”) have both rights and duties with respect to use rates and maintenance of the land. Finally, non-property regimes are essentially open-access, in which all individuals have rights but no duties with respect to use and maintenance of land. DANIEL WACHTER, *FARMLAND DEGRADATION IN DEVELOPING COUNTRIES: THE ROLE OF PROPERTY RIGHTS AND AN ASSESSMENT OF LAND TITLING AS A POLICY INTERVENTION* 27-28 (Land Tenure Center, University of Wisconsin-Madison, LTC Paper 145, 1992).

Land tenure rights are not a single entitlement in any of these different ownership systems. The rights are multiple and varied. The analogy of a “bundle of sticks” has been used in both Anglo-American and European Civil Law to describe the highly variegated land rights that are associated with the concept of “ownership” of land. The specific rights may include rights of: possession; to exclude others from the land; to sell land or lease it to others; to use the land; to enjoy the fruits or profits from the land; and others.<sup>2</sup> Any or all of these specific rights may be perpetual or may be for a limited term. All land systems also impose variegated sets of duties or restrictions on those who hold land rights.

Specific clarification of the rights and duties associated with ownership are crucial in any land ownership system. Owners and non-owning users of land cannot operate efficiently or equitably if they do not know or understand what land rights and duties they possess.

This chapter contains four sections. This introductory section provides a brief overview discussion of private ownership, state ownership, and collective ownership systems of land. Section II discusses a series of ownership-related legal issues and potential impediments associated with establishing secure and transferable land rights in ECA countries. Section III discusses how the laws of various developed countries address the issues relating to land ownership that are introduced in Section II. Section IV, based on the discussions in Sections II and III, presents a checklist of land ownership-related legal impediments in ECA countries and some potential solutions to such impediments.

### **A. Private Ownership Systems**

The combination of private ownership and extensive individual rights has been the cornerstone of Western European, North American, and Australian societies for the last two hundred years.<sup>3</sup> Until the second half of the 19th century, the concept of private land ownership in these societies meant that the private landowner’s rights were virtually absolute. In general,

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<sup>2</sup> For a more detailed listing of the specific rights, see Chapter 1, *Introduction to Rural Land Law Reform*, note 9 and accompanying text.

<sup>3</sup> In these countries, all ownership of land was originally derived from the government. For example, in the United States all land held in private ownership was originally acquired by grant from the English Crown (before U.S. independence), the United States federal government, or an individual state government. At the time of America’s “discovery” by Europeans in the 15th century, the European powers had a mutual understanding that any new territory would be owned by the European nation that first “discovered” the territory and was prepared to exercise control over the territory. Following the American Revolutionary War, England signed a treaty with the United States giving ownership of land separately to each of the original thirteen states. Because much of the land in various states was still occupied by hostile Native Americans, the states transferred ownership of that land to the United States federal government. The federal government also acquired additional lands in the western portion of the country by discovery, conquest, and by purchase from France, Spain, and Russia. While the federal government and individual state governments continue to own some land, most land, including 98% of arable land, has been granted in private ownership. Land still owned by the federal government is almost entirely desert, grazing land, tundra, or forest land. The bulk of the land held by the federal government is in lightly-populated areas of the western continental United States and Alaska.

private landowners had absolute power over their land and could do as they pleased with the land even if this caused detriment to their neighbors or to society.<sup>4</sup>

With the growth of population centers, the development of cities, the increased recognition of environmental and economic externalities from actions of private landowners, and other transformations of the industrial revolution, all societies characterized by private land ownership systems began to restrict the absolute rights of private landowners in order to strike a greater balance between the unbridled right of the individual in land and the needs of society. Governments in these countries now promote the public interest and restrict private land rights in numerous ways including land use regulations, limits on private acquisition, regulation of tenancy relationships, and the state power to acquire the property (eminent domain). These restrictions will be discussed below in various chapters of the report. The extent and nature of those restrictions vary from country to country, but in no country are the rights of private landowners absolute.

In addition to the typical advantages of private ownership, there exist some potential negative effects of private ownership. These potential effects include: (a) a concentration of land resources in the hands of a small number of private owners; (b) the related problem of inequitable access to land by lower-income groups; and (c) a significant divergence between the private returns that motivate the actions of private owners and the social gains and losses affecting the greater community.

High concentrations of land ownership and accompanying landlessness often lead to inequitable patterns of economic development. Such situations have often led to redistributive land reforms within the private ownership system and/or a change to a system dominated by state ownership of land. Some countries with private ownership systems have imposed restrictions to avoid problems of non-egalitarian landholding patterns. Such restrictions are discussed in **Chapter 7, Land Transactions.**

In private ownership systems, significant divergences can arise between the private returns that motivate a landowner and the social gains and losses that impact the greater community. This divergence in private and social interests can arise for at least two reasons. First, some actions beneficial to a private owner impose costs on others in the community or on the community at large that are not incurred by the private owner (negative externalities).<sup>5</sup>

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<sup>4</sup> The mid 19th-century concept that private landowners had absolute power over their land even at the expense of detriment to neighbors or to society is illustrated by a superior court decision from Norway in 1848. In that case, the owner of a brick works had been digging clay on his land, and this caused a landslide on the neighboring ground, damaging a municipal road and destroying a private house. The existing law did not allow the municipality or the homeowner to collect damages. However, the municipality did ask for a court order to have the digging stopped. The court denied this request on the ground that the digging did not go beyond the limits of a landowner's power. The court declared that in case of doubt, there was a presumption that an owner has an unrestricted right of his disposition over his land. AXEL HAEREM, LEGAL RESTRICTIONS ON THE PRIVATE OWNERSHIP OF LAND IN NORWAY 1 (undated) (unpublished manuscript, on file with the Rural Development Institute).

<sup>5</sup> Classic examples of negative externalities include air, water, or ground pollution to nearby land plots.

Second, the private owner will not undertake those actions or investments involving privately owned land that would provide social gains, but not private gains (or insufficient private gains).

Many of the problems of divergent private and social interests can be corrected by altering land rights to better reflect gains and losses. Most efforts by countries with private ownership systems to restrict rights of individual landowners are aimed at altering the balance between private and public rights to better reflect the actual gains and losses. Such restrictions include land use restrictions (some of which are discussed in **Chapter 6, *Land Use Regulations***), limits on acquisition (some of which are discussed in **Chapter 7, *Land Transactions***), land taxation (discussed in **Chapter 10**), and compulsory acquisition (discussed in **Chapter 11**).

Private land ownership normally includes important rights such as: (a) secure long-term or permanent possession of the land and rights to its fruits; (b) minimal restraints on the use of land; (c) minimal restraints on the transfer of land; and (d) ability to use land as collateral in acquiring capital. These rights confer important advantages to private landowners. First, the tenure security normally associated with privately owned land has the principal economic advantage of the "sowing and reaping" rationale. That is, private landowners can be secure in the knowledge that the benefits of investing in land will accrue to them, even if the benefits are realized in the distant future and even if they choose to sell the land after making the investment. In the case of sale, the value of the investment will still go to the seller because the market price of the land should reflect any investments, including slow-maturing investments that will increase future yields.<sup>6</sup>

Second, a relative lack of restriction on the use of land can promote efficiency by allowing private landowners to change land uses quickly in response to changing conditions. Restrictions in private land ownership legal regimes are more likely to be restrictions on movement between broad categories of use (e.g., from agricultural to commercial or industrial use) than on movement within such broad categories (e.g. from growing wheat to growing cotton or planting fruit trees).

Third, the transferability of privately owned land facilitates efficient allocation of land. If another person is able to work the land more productively than the present owner, the owner can transfer the land at a mutually advantageous price.

Fourth, privately owned land typically can be used as collateral (mortgaged) to obtain greater access to credit or credit on more favorable terms. This overcomes a significant obstacle to undertaking beneficial investments on or in land.<sup>7</sup>

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<sup>6</sup> Jack Knetsch, *Land Use: Values, Controls and Compensation*, in *LAW AND ECONOMIC DEVELOPMENT IN SOUTHEAST ASIA* 302 (Euston Quah & William Neilson eds., 1993).

<sup>7</sup> *Id.* at 302.

The four advantages listed above are chief characteristics of private land ownership systems. These advantages are typically less characteristic of state ownership and group ownership systems. These advantages, however, can also be found in state or group land ownership systems accompanied by long-term private use rights.

The absence of private ownership of land may make developing a land market more challenging, but it remains possible if the state or collective landowner is willing and legally able to allocate a large proportion of the land to private individuals or entities for long-term and transferable use. Long-term use rights can be a reasonable substitute for private ownership, if the interest in land is transferable, marketable, mortgageable and bears few restrictions and duties. In other words, the long-term use right must include a bundle of owner-like rights.

## **B. State Ownership Systems**

Virtually all countries acknowledge and use the concept of state or government ownership of land to some degree. In its extreme form, the state may own all or nearly all the land and allocate rights of access, use, development and transfer. This situation applies in many ECA countries as well as many countries in sub-Saharan Africa. In other cases, state ownership may be reserved for areas of strategic importance or as a reserve right in case of future need.

The tenure arrangements for use of state land also vary. In some cases the state offers leasehold rights to individuals or groups. These may be for a variety of purposes and for varying lengths of time. In Israel, for example, where most land is state-owned, the state offers leaseholds for up to 196 years.

In other cases, especially in Africa, these lands continue to be occupied by indigenous inhabitants in accord with their customary rules (discussed below). Direct state operation and use of land is also common in settings with widespread state ownership and is typically carried out by state farms or other state enterprises.

The concept of state land ownership, introduced in the 20th century, was often a reaction in part to the perceived and actual negative consequences of relatively unrestricted private ownership. By taking more direct control of use and allocation of land resources it was envisaged that greater equity would be achieved. However, the concept of state land ownership has proven to have many limitations. State land ownership often places excessive demands upon the capacity and integrity of administrative systems and their ability to respond efficiently to changes in demand. It has also often resulted in insufficient tenure security for the users, which in turn has constrained investment patterns. As in the case of private ownership systems, tenure rules can be modified to mitigate these negative consequences and to encourage more appropriate activity and investment.

## **C. Group Ownership Systems**

Group ownership systems include collective, communal, and many customary or traditional tenure systems. Some of these systems, such as in China and Mexico, were



established by twentieth-century land reforms. Others, found mainly in sub-Saharan Africa,<sup>8</sup> Latin America,<sup>9</sup> and the South Pacific<sup>10</sup> evolved from tribal or other customary land systems. While each of these systems differ, most share basic characteristics. First, the "ownership" or ultimate rights to land are held by a defined group of people held together by ethnic, kinship or production relationships. Second, these systems are often largely concerned with ensuring access to land for all members of the group. Third, the systems often involve the establishment and maintenance of reciprocal obligations between people within a group. Fourth, nearly all allow for individual occupation and cultivation of at least some of the land. Finally, the systems typically prohibit or restrict transfer of land interests to individuals outside the group.

Many of the collective, communal, and customary or traditional tenure systems evolved when there were few opportunities for trading surplus production, and there was a high degree of social cohesiveness of the group, little possibility of enforcement of contracts, and limited technical or economic change. Largely as a consequence of these conditions, these ownership systems tend to treat land less as a factor of production and more as a source of security and a center of cultural or ideological values and obligations.

However, the degree of effectiveness of these systems is often a function of the social cohesiveness of the group, the relative lack of demand for land, and the dearth of new opportunities to utilize resources for gain. With an increase in rural population relative to land availability, and greater opportunities for taking advantage of technological and market changes, some of the restrictions characteristic of these land systems come at increasing costs. While such land systems often allow for individual occupation and cultivation of land, tenure is often insufficiently secure for individuals to be confident of receiving all the benefits of land. Moreover, the corporate rather than proprietary nature of rights to transfer or allocate land acts as a constraint to those desiring social mobility. Constraints to transferring land and using land as collateral for needed credit restricts options for economic and social betterment.

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<sup>8</sup> In much of Sub-Saharan Africa, customary tenure systems regulate the use of land which is technically state-owned. In these situations, the status of state ownership usually means nothing to the owners. One expert estimates that perhaps 80% of African farmers hold the land they farm under customary tenure systems. JOHN W. BRUCE, LAND TENURE ISSUES IN PROJECT DESIGN AND STRATEGIES FOR AGRICULTURAL DEVELOPMENT IN SUB-SAHARAN AFRICA, note 92 and accompanying text (LAND TENURE CENTER, UNIVERSITY OF WISCONSIN-MADISON, LTC PAPER 145) (March 1986). For a discussion of customary tenure systems in Africa, see Gershon Feder, *Land Rights Systems and Agricultural Development in Sub-Saharan Africa*, 2:2 RESEARCH OBSERVER (JULY 1987); JOHN W. BRUCE, ET AL., SEARCHING FOR LAND TENURE SECURITY IN AFRICA (1993); THOMAS J. BASSETT, ET AL., LAND IN AFRICAN AGRARIAN SYSTEMS (1993).

<sup>9</sup> For discussions of customary tenure forms in Latin America, see ERIC SHEARER, ET AL., THE REFORM OF RURAL LAND MARKETS IN LATIN AMERICA AND THE CARIBBEAN (1991); and ROGER PLANT, LAND RIGHTS FOR INDIGENOUS AND TRIBAL PEOPLES IN DEVELOPING COUNTRIES (1992).

<sup>10</sup> For a comprehensive discussion of customary land tenure in South Pacific settings, see PETER LARMOUR, ED., CUSTOMARY LAND TENURE: REGISTRATION AND DECENTRALIZATION IN PAPUA NEW GUINEA (Papua New Guinea National Research Institute Monograph No. 29, 1991); B. ACQUAYE & R. CROCOMBE, EDS., LAND TENURE AND RURAL PRODUCTIVITY IN THE PACIFIC ISLANDS (University of South Pacific, Institute of Pacific Studies and UNFAO, 1984).

## II. Ownership-Related Issues in ECA Countries

### A. Private Ownership of Land

There are two different ways of looking at legal provisions concerning private ownership of land in ECA countries. First, does the law provide for private ownership of land in principle, and second, is the bundle of rights normally associated with private ownership rights provided for in legislation?

The non-FSU countries of Central and Eastern Europe all allow private ownership of land in principle. In fact, private ownership of land remained constitutional and "legal" throughout the collectivist era in most of these countries.<sup>11</sup> A constitutional recognition of private ownership in land, however, does not necessarily contribute to land market development. A more detailed legal framework is required, and restrictions on core characteristics normally associated with private ownership, especially rights of land transfer and land use,<sup>12</sup> will diminish the importance of the rights of ownership.<sup>13</sup> Until recently, Turkmenistan was the only Central Asian country with a constitution formally recognizing private ownership of land, yet this has done little to spur land reform or develop a land market.<sup>14</sup> In fact, "privately-owned" land in Turkmenistan, according to law, may not be sold, gifted, or even exchanged.<sup>15</sup>

The Kyrgyz Republic initially dealt with the contentious issue of private ownership of land that had formerly been held by the state or in collective ownership by prohibiting full ownership of land but allowing use rights with "ownership-like" characteristics. The Kyrgyz constitution initially did not allow private ownership of land.<sup>16</sup> However, up to 99-year use-rights were allowed and use-rights could be sold, purchased, bequeathed, gifted, or mortgaged.<sup>17</sup>

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<sup>11</sup> Zvi Lerman, *Changing Land Relations and Farming Structures In Formerly Socialist Countries*, in AGRICULTURAL LANDOWNERSHIP IN TRANSITION ECONOMIES 58 (Gene Wunderlich ed., 1995). The significance of such "ownership" was often greatly attenuated. In Czechoslovakia, for example, most private owners of agricultural land were effectively forced to allow the local collective farm to use their land, although they normally remained the private owner of the land. *Id.*

<sup>12</sup> See Chapter 7, *Land Transactions* for a detailed discussion of restrictions on land transfers. See also Chapter 6, *Land Use Regulations* for a detailed discussion of land use restrictions.

<sup>13</sup> Lerman, *supra* note 11, at 58.

<sup>14</sup> Zvi Lerman & Karen Brooks, *Land Reform in Turkmenistan*, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE 162 (Stephen Wegren ed., 1998) [hereinafter Land Reform].

<sup>15</sup> *Id.* at 173-75.

<sup>16</sup> CONSTITUTION OF THE KYRGYZ REPUBLIC art. 4. Article 4 initially provided: "In the Kyrgyz Republic the land, its subsoil, water, air space, forests, fauna and flora—all natural resources—shall be the property of the State." *Id.*

<sup>17</sup> Decree of the President of the Kyrgyz Republic "On Measures for Further Development and State Support of Land and Agrarian Reform in the Kyrgyz Republic" (November 3, 1995). The Kyrgyz Republic amended their

In other contexts, the concept of state or group land ownership has been joined with much more limited private use rights. State or collective control over agricultural land has, in such settings, often continued virtually unabated, with no prospects for a private market in land rights.

In Uzbekistan, for example, collective agricultural enterprises can own land. Citizens and non-agricultural enterprises, however, can only be allocated agricultural land for permanent or temporary use.<sup>18</sup> Regional governments allocate land to private farms and determine the size and term of the allocation. Private farms can only be allocated land in lifetime inheritable possession or long-term lease (longer than ten years).<sup>19</sup>

In practice, citizens and private farmers in Uzbekistan lease land from the collective agricultural enterprises and are therefore at their mercy. Leases and use rights can be canceled by the agricultural enterprise or local government for "violation of the lease contract" and various other transgressions. The lease contracts often provide that certain crops must be planted and delivered to the collective.<sup>20</sup> Agricultural enterprises together with the local government decide who can have access to land. There is no guaranteed right to access land for individual or family use, even if you are a member of a collective or state farm.

In Uzbekistan, even the household auxiliary plots are held only in lifetime inheritable possession. The administrators of the agricultural enterprise allocate land for household plots. The criteria for plot size include: availability of land, participation of the recipient in the work of the collective farm, limits set by the enterprises' charter, and the opinion of the administrator.<sup>21</sup>

In other cases, private ownership of agricultural land is not entirely prohibited but may be limited to land acquired for a strictly defined purpose. For example, Belarus' Law "On Rights of Ownership of Land" provides that ownership of land may be acquired only for strictly defined purposes of a personal nature, such as construction of a house or gardening.<sup>22</sup> Private ownership of land was first introduced in Russia for similarly limited purposes, e.g. for various small plots

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constitution by a popular referendum in October 1998 to, among other things, allow private ownership rights to land.

<sup>18</sup> Law of the Republic of Uzbekistan "On Land," art. 10. (June 20, 1990) (as amended August 31, 1995) [hereinafter Uzbekistan Land Law].

<sup>19</sup> *Id.* art. 23.

<sup>20</sup> Julia Eckert & George Elwert, *Land Tenure in Uzbekistan*, for Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) Sector Project: Relevance of Land Tenure Development for Developing Countries (February 1996). Rural Development Institute field research confirmed this practice (January 1988).

<sup>21</sup> Uzbekistan Land Law, *supra* note 18, art. 21.

<sup>22</sup> Belarus: *Recent Developments in Land Legislation*, EAST/WEST EXECUTIVE GUIDE (January 1, 1996), available in LEXIS.

including garden plots, dacha plots, and household auxiliary plots.<sup>23</sup> Such restrictions may not be a substantial problem if all or most other categories of land can be leased or used for long time periods and if these are legally permitted to be sold, leased, mortgaged, and transferred by gift and inheritance. The fact that the state or collective still formally owns the land, however, must be assessed in terms of the likelihood that old-style bureaucrats or collective leaders will use such "ownership" as an excuse for heavy-handed interference with the private landholder's rights to use or transfer.

## **B. Ownership of Subsoil Rights**

Most ECA countries that have privatized land have privatized only surface rights and not subsoil rights. Some commentators have raised this as a concern and possible impediment to a land market,<sup>24</sup> although some Civil Law jurisdictions do in fact take the same approach.

In the Russian Federation all subsurface resources remain state property, including both valuable and invaluable materials.<sup>25</sup> According to the Russian Federation Constitution:

1. The land and other natural resources shall be used and protected in the Russian Federation as the basis of the life and activity of the peoples living in their respective territories; and
2. The land and other natural resources may be in private, state municipal and other forms of ownership.<sup>26</sup>

While the Constitution does not clearly dictate that the state retains control over all subsurface materials, the law "On Underground Resources" clarifies the state's ownership. It asserts that the entire subsurface belongs to the state (local or federal) and specifies that licenses must be obtained to exploit mineral resources or to conduct underground construction of any kind.<sup>27</sup> Thus, any interference with the subsurface is subject to state approval and user fees.<sup>28</sup> These licenses are assignable and are obtained from the state through auction.<sup>29</sup> Licenses to mine are

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<sup>23</sup> Law of the Russian Federation "On the Right of Citizens of the Russian Federation to Acquire as Private Property and To Sell Tracts of Land to Conduct Private Subsidiary Farming and Dacha Economies, Horticulture, and Private Housing Construction" (December 23, 1992).

<sup>24</sup> See Steven E. Hendrix, *Legislative Reform of Property Ownership in Kazakhstan*, 15 DEVELOPMENT POLICY REVIEW 159, 161 n.2 (June 1997).

<sup>25</sup> Law of the Russian Federation No. 2395-1 "On Underground Resources" (February 21, 1992).

<sup>26</sup> CONSTITUTION OF THE RUSSIAN FEDERATION art. 9.

<sup>27</sup> Law On Underground Resources, *supra* note 27.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

limited by a fixed term, while licenses for the construction of underground facilities, unrelated to mining, are of unlimited duration.<sup>30</sup>

A draft of the Kazakh Land Code provided that private property is a surface interest only, not a subsoil right.<sup>31</sup> A draft of the Kyrgyz Republic Land Code provides that a private owner of land owns all the commonly found subsurface resources, but the state retains ownership of the valuable subsurface resources.

At a minimum, any laws governing ownership of land should make clear who holds subsoil rights. If the state retains subsoil rights to privatized land, the law should make clear what kind of compensation is paid to the private landowner if the state exploits (or grants a concession to a third party to exploit) subsoil rights in such a way as to interface with use of the surface.

### C. Foreign Ownership of Land

Several ECA countries have legally prohibited the ownership or purchase of land by foreign citizens and legal entities. The impetus for such action seems to be two-fold: to discourage absentee ownership and encourage owner cultivation; and a fear that wealthy foreign interests will buy up vast tracts of agricultural land at prices far higher than what most ECA country citizens can afford.

Latvia extends land ownership rights to legal persons who are registered in Latvia and have more than one-half of their equity from Latvian citizens or joint ventures from states with which Latvia has concluded investment agreements.<sup>32</sup> Lithuania amended its constitution to extend land ownership rights to foreign natural and legal persons in the European Union and OECD member states but specifically excluded agricultural land.<sup>33</sup> Russia does not currently forbid foreign ownership of land but several draft laws have specifically forbidden foreign ownership of agricultural land. Albania, Belarus, Estonia, and Romania do not allow foreign ownership of land but provide for long-term lease rights.<sup>34</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Draft Land Code of Kazakhstan (1995). While this draft land code did not pass, and the Federal Assembly has not yet passed a land code, a Law "On Land" was adopted by Presidential Decree in December 1995.

<sup>32</sup> William H. Meyers & Natalija Kazlauskienė, *Land Reform in Estonia, Latvia, and Lithuania in Land Reform*, *supra* note 14, at 104.

<sup>33</sup> *Id.*

<sup>34</sup> STEPHEN HODGSON & CORMAC CULINAN, *A COMPARATIVE SURVEY OF LEGAL AND ADMINISTRATIVE MEASURES TO RESTRICT, REGULATE OR BENEFIT FROM THE OWNERSHIP OR USE OF LAND BY FOREIGNERS* 46, 47 (Food and Agriculture Organization of the United Nations, April 1995).

In Ukraine, the Land Code prohibits the sale of land to foreigners.<sup>35</sup> Under Hungary's law the ownership of land by corporations is prohibited.<sup>36</sup> Lithuania constitutionally limits land ownership to citizens.<sup>37</sup> The Czech Republic also prohibits the transfer of land into the ownership of persons who are not Czech nationals.<sup>38</sup> The Bulgarian Constitution likewise states that "no foreign physical person or foreign legal entity shall acquire ownership over land. . . ."<sup>39</sup>

While any restriction on who can participate in the land market is an impediment to that market, prohibition of foreign ownership may bring advantages that, on balance, make such a restriction palatable. First of all, the numerous ECA examples of this restriction demonstrate its political attractiveness, and may be a warranted concession if needed to pass legislation granting citizens broad rights to own and alienate land. Second, from an equity standpoint the reservation of such a fundamental and emotional property interest for citizen ownership may be justified if the risk is high that foreign interests will buy up large amounts of land. On the other hand, prohibition of foreign land ownership may discourage investment, which is sorely needed in the rural sectors of ECA countries.

Restricting foreign ownership of agricultural land at this stage in the reform process may be a politically favorable policy. Moreover, such a policy is likely to have little effect on land market transactions if foreigners can otherwise access agricultural land directly through lease rights or indirectly through joint ventures. Forbidding foreign ownership of agricultural land, therefore, may be a concession reformers want to make in order to achieve greater land rights for the citizens of ECA countries.

#### **D. Enterprise Land Ownership**

A policy concern predominant in Central and Eastern Europe has been that both foreign and domestic enterprises would buy up the majority of the newly privatized land in the early stages of privatization.<sup>40</sup> In the early stages of reform in Estonia, Latvia, and Lithuania, only private individuals and the state could own agricultural land. All legal entities (organizations and enterprises) were excluded from agricultural land ownership.<sup>41</sup> This restriction still applies in

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<sup>35</sup> LAND CODE OF UKRAINE art. 6.

<sup>36</sup> Csaba Csaki & Zvi Lerman, *Land Reform and Farm Restructuring in Hungary in the 1990s*, in *Land Reform*, *supra* note 14, at 234-35.

<sup>37</sup> CONSTITUTION OF LITHUANIA art. 47.

<sup>38</sup> Law of the Czech Republic No. 229 "On Modifying Ownership Relationships with Respect to Land and Other Agrarian Property," sec. 3 (May 21, 1991).

<sup>39</sup> CONSTITUTION OF BULGARIA art. 22.

<sup>40</sup> Meyers & Kazlauskienė, *supra* note 32.

<sup>41</sup> *Id.* at 92.

Lithuania and Estonia, and is identified as an unnecessary constraint to land sales because agricultural companies which farm approximately 25% of the cultivated land, cannot engage in sales transactions. Moreover, legal entities that do not own land are not able to use land as collateral for mortgages.<sup>42</sup>

Hungary's 1994 land law recognized individual ownership of land, but not corporate or cooperative ownership. This substantially limited the range of enterprises that have the ability to liquidate or acquire additional land assets.<sup>43</sup> Moreover, this restriction reduces both a corporation's incentives to invest in agriculture and the availability of credit to these organizations.<sup>44</sup> The purported purpose for this provision was to block land ownership by foreign entities, a policy goal that can be accomplished more effectively by explicitly limiting the land ownership ban to foreign enterprises. In the alternative, a maximum ceiling for enterprise land ownership might be established.<sup>45</sup>

In contrast, Russian law does not restrict enterprises from owning land. However, during the collective and state farm reorganization process in Russia, one potential impediment to individual private ownership of land has been the threat that land share owners will be pressured to contribute their ownership rights to the large farm enterprises, thereby giving up all rights to their land. During farm reorganization in Russia, land shareowners can be and have at times been pressed to contribute ownership of their land share to the charter capital of the enterprise without the right to later withdraw their land share rights to start a peasant farm. Large agricultural enterprises are often in a position to coerce land shareowners who are not presently ready to start a peasant farm and therefore must contribute their land share ownership rights to charter capital.

The Russian "Law on Agricultural Cooperation" (December 1995) contains provisions that allow members of farm enterprises to permanently contribute ownership rights to their only land assets to a production cooperative.<sup>46</sup> The law anticipates that most production cooperatives will be created as a result of reorganization of existing agricultural organizations. Article 10(1) provides that members of a farm enterprise organization can decide to preserve the existing structure of the farm enterprise organization while bringing it into conformity with the Law on Agricultural Cooperation, or they can decide to reorganize the farm enterprise organization into one or several cooperatives, other agricultural organizations, or peasant farms. Article 10(2) provides that if reorganization is undertaken, each member shall decide whether to join the new

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<sup>42</sup> *Id.* at 105.

<sup>43</sup> Csaki & Lerman, *supra* note 36, at 234-35.

<sup>44</sup> See Chapter 8, *Mortgage*.

<sup>45</sup> See Chapter 6, *Land Use Regulation*.

<sup>46</sup> The provisions in the Russian Civil Code on joint stock companies, articles 96-104, do not explicitly allow withdrawal in-kind of contributions to charter capital.

cooperative or other new agricultural organization, or to instead form a peasant (farm) enterprise. If an individual chooses to join the new production cooperative, he must contribute a participatory share to the participatory share fund of the cooperative (Article 10(3)). In the case of an agricultural cooperative, the contribution can include a permanent contribution of ownership rights to a land plot or a land share.<sup>47</sup> While such members do have other choices, the danger is that farm enterprise managers will coerce members (who are unlikely to fully understand their rights) to make an irrevocable contribution of ownership rights to their land assets.

There are several possible solutions to help prevent farm enterprise managers from coercing members to contribute their land (plot or share) ownership rights to the charter capital of the enterprise. First, while land ownership by enterprises might be allowed, irrevocable contributions of land (plot or share) ownership rights could be forbidden entirely, or a two-three year moratorium might be placed on such transfers after land shares have been issued. In the alternative, irrevocable capital contributions could be allowed providing certain safeguards were in place. These safeguards might include: allowing only bilateral -- not multilateral -- transactions; a warning on the standard contribution contract; and possibly a requirement that the contract be notarized.

#### **E. Common Ownership of Land**

Specific legal rules regarding use and disposition of land held in common ownership by two or more people are necessary for those common owners to enjoy tenure security and to engage in the land market. One common situation in the FSU is for land rights formerly held by collective or state farms to be divided among the agricultural workers of the farm. Each member of the farm has the right to a land share. Land shares represent an undemarcated share of land on the territory of an agricultural enterprise in which the land shareowner is a worker, pensioner, or social sphere worker. Land shares are owned by individuals and represent an undemarcated interest of a specified quantity of land held in common with other land shareholders.<sup>48</sup>

The Russian Civil Code addresses common ownership, but does not adequately address the specialized common ownership issues of land shareowners. For example, Article 252(2) generally permits any participant of common participatory share ownership of property to demand partition of their participatory share in kind, but then adds in 252(3) the requirement that the participants "reach agreement concerning the means and conditions" for the partition. In the

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<sup>47</sup> Individuals can also contribute a lease of their land plot, allowing them to assume control over the land plot after the lease expires. *Id.* art. 10(3).

<sup>48</sup> If the interest were held in the US or most other common-law jurisdictions, a land share owner who held one of five hundred equal shares in 4,000 hectares of land located on the territory of a collective farm would be described as having "an undivided one-five-hundredth interest" in those 4,000 hectares. She could, if she wished, petition a court for "partition" of a separate, physically demarcated eight hectares, which she would then hold in individual ownership. This would, however, be a highly unusual situation, since most common ("concurrent") interests in land are held by two, or at most a very small number of, people in those countries.



absence of such agreement, the participant must go to court to demand partition. Article 252 has been interpreted by some to require unanimous consent of all participants in order to avoid what is likely to be an expensive and protracted court proceeding.

Most land on Russian collective agricultural enterprises, whether or not reorganized, is held in common share ownership. The individual's right to exit the enterprise with his land share partitioned in kind, without unanimous consent or other agreement with other common owners, has been the basis for essentially all meaningful agricultural land reform since early 1993.<sup>49</sup> Under various legal enactments issued in 1991,<sup>50</sup> 1992,<sup>51</sup> 1993,<sup>52</sup> and 1996<sup>53</sup> the land shareholder was given the right to sell, lease, and give his land share to others, as well as to withdraw the land represented by the land share from the enterprise to start a peasant farm enterprise.

Though the Civil Code's withdrawal provisions are appropriate for most types of property held in common ownership, they are not appropriate for agricultural land shares. Land shares are completely different in form and function from other types of property held in common ownership, including the usually very large number of common owners, and thus need to be governed by special rules. It is unlikely that the Civil Code authors were considering land shares, but there has been confusion about whether these provisions apply to land shares. In fact, common ownership provisions in the Russian, Kyrgyz, Uzbek, and Czech Civil Codes are very similar to provisions found in the Civil Codes of Western European countries. Common ownership of collective farms was not considered in the development of these Western European codes. Either the Civil Codes or land legislation from the ECA countries need to clarify how common ownership rules of land in large farms differ from the general rules regarding common ownership of land and property.

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<sup>49</sup> Prior to that time, the principal source of land for individual peasant farms was the *raion* land funds.

<sup>50</sup> Resolution of the Government of the Russian Federation No. 86 "On the Procedure for Reorganization of Collective and State Farms" (December 29, 1991). Resolution No. 86 established the rights of members of collective farms, workers on state farms, and pensioners to receive land shares and property shares.

<sup>51</sup> Resolution of the Government of the Russian Federation No. 708 "On the Procedure for Privatization and Reorganization of Enterprises and Organizations of the Agro-Industrial Complex" (September 4, 1992) specified the manner in which collective and state farms would reorganize and distribute land shares and property shares.

<sup>52</sup> Decree of the President of the Russian Federation No. 1767 "On Regulation of Land Relations and Development of the Agrarian Reform in Russia" (October 27, 1993). Decree No. 1767 gave land share owners the right to sell, lease, mortgage, and bequeath their land shares; to exchange their land shares for property shares; and to use the land share to increase private plots for the purposes of private small-holding farming or individual housing construction.

<sup>53</sup> Decree of the President of the Russian Federation No. 337 "On Citizens' Constitutional Rights to Land" (March 7, 1996). This decree confirmed the rights of land shareowners to lease land shares and to transfer land shares through sale, gift, inheritance, and exchange. It also directed the Government to issue model forms for land share transactions.

A draft Land Code in Kazakhstan presented similar issues of clarity regarding joint ownership of property.<sup>54</sup> Article 28 of that draft stated that if one owner wants to leave property held in joint ownership, the other owner must purchase the entire property.<sup>55</sup> However, the draft law is silent as to what happens if there is no agreement or the remaining owner refuses to purchase.<sup>56</sup>

#### F. Ownership of Grazing Land

Land reform processes in some ECA countries have focused on individualizing and/or privatizing rights to arable land, and not on defining rules governing widely shared or so-called "common property" resources such as natural pasture or grazing land.<sup>57</sup> While privatized individual rights are usually appropriate for arable land, they typically are not suitable for large-scale, common property resources such as natural pasture or grazing land.<sup>58</sup>

Livestock production in large parts of many ECA countries, especially in Central Asia, depends on natural pasture, which in turn depends on low and variable rainfall.<sup>59</sup> This limits pasture production in any one place. Herding households or groups typically respond by moving herds within grazing territories, which increase in size as rainfall diminishes and variability increases. This means that pastures in such settings can rarely be divided between individual households as viable grazing lots because the area available to each household would be too small and of varying productivity. Moreover, viable pasture territories must include pastures for all four seasons, and so usually must be quite large. Some type of common property system is usually most viable for such settings.

Most discussions of common resource management start with the model developed by Garrett Hardin in the 1960's. This model, "tragedy of the commons," postulates that degradation of the environment and common resources will occur whenever many individuals use a scarce

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<sup>54</sup> Draft Land Code of Kazakhstan (1995), *supra* note 31.

<sup>55</sup> Hendrix, *supra* note 24, at 164.

<sup>56</sup> *Id.*

<sup>57</sup> Peter C. Bloch & Kathryn Rasmussen, *Land Reform in Kyrgyzstan*, in *Land Reform*, *supra* note 14, at 131.

<sup>58</sup> In determining what type of ownership regime is appropriate for pasture, one must be careful to distinguish between different types of pasture. For small-scale pasture, such land around livestock shelters and pasture or hay fields cultivated by individual households, individualized private ownership or privatized userights may be appropriate. However, for large-scale uncultivated pastures which have been used by a larger group of persons, some type of group or state ownership is likely to be appropriate and introducing private ownership can cause serious problems.

<sup>59</sup> FAO statistics indicate that ECA countries with more than 8 million hectares of permanent pasture land include Kazakhstan (186.8 million ha), Russia (87.3 million ha), Turkmenistan (30.0 million ha), Uzbekistan (20.8 million ha), Turkey (12.4 million ha), and Kyrgyzstan (8.5 million ha). FAO PRODUCTION YEARBOOK 8-13, table 1 (1995).

resource in common.<sup>60</sup> More recent and comprehensive research indicates that common property regimes need not resemble the open access regime that Hardin described, but can be (and often are) structured ownership arrangements within which management rules are developed, group size is known and enforced, incentives exist for co-owners to follow the accepted institutional arrangements, and sanctions work to insure compliance.<sup>61</sup>

Legal landownership regimes and associated grazing policies established at the national level in several ECA countries ignore unique local conditions and customs and fail to effectively regulate the activity of local resource users. For example, the draft Land Code in Kazakhstan held cattle owners responsible to landowners for damage caused by livestock crossing the land.<sup>62</sup> In practice, however, cattle owners may have crossed the land for years and had customary grazing rights. The draft law is not clear on whether or how "custom" is recognized, nor is it clear on whether the cattle owners must pay the state if the land is state owned.<sup>63</sup> Ambiguities in the application of the land code to local practice as well as the apparent conflict between local custom and national policy will likely limit the management institutions' ability to enforce these policies.

The absence of clear legal rights and responsibilities governing the use of grazing lands in the Kyrgyz Republic could be a potential problem when herd sizes increase and conflicts over grazing rights arise.<sup>64</sup> The state has maintained ownership of the land and allocated management responsibilities to the village governments, with few guidelines for appropriate practices or requirements to formalize rules.<sup>65</sup> Short and long-term lease arrangements for herders, five and

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<sup>60</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>61</sup> See DANIEL W. BROMLEY & MICHAEL M. CERNEA, THE MANAGEMENT OF COMMON PROPERTY NATURAL RESOURCES (World Bank Discussion Paper 57, 1989). An inevitable "tragedy of the commons" has been challenged by Ellickson who notes that close-knit villagers and their leaders often develop internal social controls to encourage cooperative use of common land. Ellickson, *supra* note 1, at 1315, 1386-91. Netting identifies five attributes that might make a certain piece of land more suitable for communal land tenure. These include: (a) the value of production per unit of land is low; (b) the frequency or dependability of use or yield is low; (c) the possibility of improvement or intensification is low; (d) a large territory is needed for effective use; and (e) relatively large groups are required for capital-investment activities. See ELINOR OSTROM, GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 63 (1991).

<sup>62</sup> Hendrix, *supra* note 24, at 164.

<sup>63</sup> *Id.* at 163.

<sup>64</sup> Bloch & Rasmussen, *supra* note 57, at 131.

<sup>65</sup> The non-ECA country of Mongolia may provide lessons concerning centrally determined guidelines for local management of grazing land and the formalization of local use and management rules. The Institute of Development Studies at the University of Sussex (United Kingdom) has recently undertaken a collaborative research and policy study project on grazing land tenure in the non-ECA country of Mongolia where common grazing land comprises 79 percent of the total land area. The project involved a comprehensive review of legal and policy options for grazing land tenure in Mongolia. See *Options for the Reform of Grazing Land Tenure in Mongolia* (Policy Alternatives for Livestock Development in Mongolia Policy Options Paper No. 1, 1993).

ten years respectively, resemble western rental agreements and provide little form of secure tenure.<sup>66</sup>

### III. Ownership Related Issues in Developed Market Economies

#### A. Private Ownership of Land

Italy, Germany, Japan, France, and the United States all allow private ownership of agricultural land with varying degrees of restrictions on ownership rights. In Italy, state ownership of land is limited to ownership of forest land. In Germany, 0.5% of arable land is managed by churches, public law bodies, and regional administrative bodies. In Japan, 0.4% of agricultural land and 0.5% of arable land is publicly owned. Almost all publicly owned land is used as experimental research farms. In the US, less than 2% of arable land is held by the federal government, primarily for research. As is discussed in other sections of this report, private land ownership in these countries does have restrictions, but each provides for the ability of the private owners to use, manage, and dispose of land with a substantial degree of discretion.<sup>67</sup>

There are other examples of countries with "very successful agriculture based on leasehold of state land, not private ownership."<sup>68</sup> In both Israel and the Netherlands, much of agricultural land is state-owned but handled in practice like privately owned land: farmers have long-term security of tenure and individual farms can be transferred at negotiated market prices.<sup>69</sup>

The State of Israel, its Development Authority, and the Jewish National Fund together own roughly 92% of the land in Israel. (The remaining 8% is privately owned.) Land owned by each of these three entities is administered by the Israel Land Authority (ILA). These public lands may not be sold to private individuals, but have been leased to individuals for periods of up to 99 years, and the maximum lease period was recently extended to 196 years.<sup>70</sup> When the State of Israel was created in 1949, it came into possession of land from the British Mandatory government and land "abandoned" by Arabs during the War of Independence. Ownership of this land was vested in the state's newly created Development Authority. The Jewish National Fund was created in 1901 and collected worldwide donations to purchase land in Palestine on behalf of

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Mongolia's constitution prohibits the privatization of common grazing land, but the country's land law allows for state ownership of grazing land with both individual and group leaseholds of up to 60 years. *Id.* at 14.

<sup>66</sup> *The Ministry of Agriculture of the Government of Kyrgyzstan: Report on Communal Grazing Issues*, ULG CONSULTANTS LTD. at 9.

<sup>67</sup> See Chapter 6, *Land Use Regulation* and Chapter 7, *Land Transactions*.

<sup>68</sup> Lerman & Brooks, *supra* note 14, at 182.

<sup>69</sup> *Id.*

<sup>70</sup> Evelyn Gordon, Sharon: Government Lands may be Sold rather than Leased, JERUSALEM POST, 22 October 1996, at. 8.

Zionists hoping to found a Jewish state. Israel's Basic Land Law of 1960 identifies all land owned by the state, the Jewish Development Authority, and the JNF as "Israel-lands" and provides that such lands shall not be transferred by sale or any other manner.<sup>71</sup> Israel's agriculture is almost entirely based on the principle of public land under leasehold.

## **B. Ownership of Subsoil Rights**

A property owner's right to use subsurface materials, both valuable and invaluable, varies from country to country. In general three main approaches are taken with regard to the ownership of the subsurface: (a) in the United States and many Western European countries, private ownership of land includes the right to use the entire subsurface; (b) in other countries the state retains ownership of all subsurface resources even if the land surface is privately owned; and (c) in some countries the state retains ownership of only valuable subsurface resources while private landowners retain ownership of commonly found subsoil resources.

It has been long established that private landowners in the United States have the right to everything beneath the land's surface.<sup>72</sup> Further, United States landowners are free to sever and transfer their mineral rights to others.<sup>73</sup>

The German Civil Code takes a similar approach:

The right of the owner of a piece of land extends to the space above the surface and to the terrestrial body under the surface. The owner may not, however, prohibit interferences which are performed at such height or depth that he has no interest in their exclusion.<sup>74</sup>

France generally grants subsurface rights to the landowner, with some limitations. According to the French Civil Code:

Ownership of the ground carries ownership above and below. The owner may do above all the plantings and constructions which he judges proper, apart from the exceptions set forth in the *Title Servitudes* and *Land Services*. He may do below all the constructions and excavations which he judges proper, and draw from such excavations all the projects that they may yield, except for limitations resulting from laws and regulations relative to mines and police laws and regulations.<sup>75</sup>

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<sup>71</sup> Basic Law: Israel Lands, passed by the Knesset on July 19, 1960, and published in Sefer Ha-Chukkim No. 312 of July 29, 1960, at 56, available on the Internet at <http://www.israel-mfa.gov.il:70/00/constit/laws/bas.5>.

<sup>72</sup> 53A AMERICAN JURISPRUDENCE 2D *Mines and Minerals* sec. 172.

<sup>73</sup> *Id.* sec. 174.

<sup>74</sup> CIVIL CODE OF GERMANY Book 3, sec. 905.

<sup>75</sup> CIVIL CODE OF FRANCE art. 552.

Thus, while landowners have the right to subsurface materials, their use is limited. Specifically, any drilling deeper than 10 meters must be declared to the supervisor of mines<sup>76</sup> and any activity involving exploration or exploitation is subject to prior government approval.<sup>77</sup>

Some countries differentiate between subsurface resources that are valuable and those that are not, and reserve state ownership solely to valuable resources. The Portuguese Constitution makes this distinction explicitly:

1. The following are part of the public domain:

... c. Mineral deposits, medical-water sources, natural underground cavities in the subsoil, other than rock, ordinary soil and other materials habitually used for building construction.<sup>78</sup>

Similarly, in Chile, the state is the owner of all rights to mineral and fossil substances, whomever may be the owner of the surface rights.<sup>79</sup> Private persons can obtain concessions to explore or exploit these resources.<sup>80</sup> These concessions are transferable, mortgageable and irrevocable. The country takes a different approach to petroleum resources in that the state reserves the exclusive right to extract petroleum.<sup>81</sup> Generally the government contracts with private enterprises for petroleum removal and shares the revenues.<sup>82</sup>

The Mexican Constitution specifies that the state is the owner of "all minerals and substances which exist in veins, strata, masses or beds, and constitute deposits of a nature different from the land" and thus, differentiates valuable from invaluable subsurface rights.<sup>83</sup> In Portugal, Chile and Mexico private enterprises can exploit valuable resources, however they must first obtain mining concessions from the respective governments.<sup>84</sup>

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<sup>76</sup> MINING CODE OF FRANCE art. 131.

<sup>77</sup> *Id.* art 7.

<sup>78</sup> CONSTITUTION OF PORTUGAL art. 84.

<sup>79</sup> MINING CODE OF CHILE, Law 18248 (Sept. 26, 1983).

<sup>80</sup> *Id.*

<sup>81</sup> CONSTITUTION OF CHILE art. 19.

<sup>82</sup> MARTINDALE-HUBBEL INTERNATIONAL LAW DIGEST CHL-8 (1998).

<sup>83</sup> CONSTITUTION OF MEXICO art. 27.

<sup>84</sup> *Id.*; MARTINDALE-HUBBEL INTERNATIONAL LAW DIGEST POR-6 (1998); MINING CODE OF CHILE.

### C. Foreign Ownership of Agricultural Land

One way to more narrowly focus a prohibition on private ownership of agricultural land is to forbid foreign persons and entities from owning land. Such prohibitions of foreign ownership can impede foreign investment, especially if foreign citizens and legal persons cannot otherwise obtain secure use rights to land and the ability to transfer those use rights. Experience from developed market economies shows that regulation of foreign ownership of land, particularly agricultural land, is more common than outright prohibitions of foreign ownership. Jurisdictions that regulate or prohibit foreign ownership of land do so for three main reasons. First, foreign ownership of land can force land prices to rise, making it difficult for local farmers to acquire land. Foreigners who buy land are often able to pay more for land than are local farmers. This, of course, may be an even more serious consideration in many ECA countries. Second, absentee land ownership may increase the number of tenant farmers or non-landowning agricultural laborers and change rural decision-making processes by changing the distribution of power. Third, these laws can result from nationalistic or xenophobic sentiments and a fear that "outsiders" will take over, or take what is valuable.

The laws of developed market economies vary widely on the issue of purchase of land by foreigners. Germany has no restrictions on purchase of land by foreign interests. Neither do France, the United Kingdom, Belgium or Luxembourg.<sup>85</sup>

Japan has no overt legal restriction on purchase of land by foreigners, but its agricultural policy strongly favors land ownership by the tillers of the soil. Japan's Agricultural Land Law, the primary legal authority governing control, use and alienation of agricultural land, requires refusal of applications for transfer of land that were "anticipated to cause landlordism."<sup>86</sup> Since very few foreigners would be interested in purchasing land in Japan for direct personal cultivation, foreign ownership effectively does not occur.

Several Canadian provinces restrict foreign ownership of land. The provinces of Alberta and Manitoba limit foreigners to owning only up to 20 acres of land, while Saskatchewan uses a land bank to keep farmland in the ownership or control of direct land cultivators.<sup>87</sup>

United States federal law does not restrict foreign purchase of agricultural land, but does require that alien owners of farmland must report their holdings and transactions to the U.S. Department of Agriculture.<sup>88</sup> However, several U.S. states do impose restrictions on foreign

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<sup>85</sup> STEPHEN HODGSON & CORMAC CULLINAN, A COMPARATIVE SURVEY OF LEGAL AND ADMINISTRATIVE MEASURES TO RESTRICT, REGULATE, OR BENEFIT FROM THE OWNERSHIP OR USE OF LAND BY FOREIGNERS 1 (Food and Agricultural Organization of the United Nations, 1995).

<sup>86</sup> Isoshi Kajii, *Development of Structural Policy -- Centering Around the Agricultural Land Legislation*, in FOOD AND AGRICULTURAL POLICY RESEARCH CENTER, CHANGES IN JAPAN'S AGRARIAN STRUCTURE 35 (1998).

<sup>87</sup> Carl V. Dombek & Cynthia Button, *Agrarian Land Law*, at 199-200.

<sup>88</sup> 7 UNITED STATES CODE ANNOTATED secs. 3601-8.

acquisition of agricultural land. For example, the states of Iowa,<sup>89</sup> Minnesota,<sup>90</sup> and Missouri<sup>91</sup> prohibit foreign ownership of agricultural land (but not other land), while Illinois requires foreigners acquiring agricultural land to file a report with the state Department of Agriculture.<sup>92</sup> The states of Indiana and Nebraska require foreigners to divest themselves of such land within five years of acquisitions.<sup>93</sup>

Not all states are concerned about foreign acquisition of land. In contrast to the laws of Iowa, Minnesota, and Missouri, Alabama law affirmatively sanctions foreign ownership of land.<sup>94</sup>

#### **D. Enterprise Ownership of Agricultural Land**

Developed countries generally allow enterprise ownership of agricultural land although restrictions may apply. In Japan, a legal entity can own land if it fits the criteria for an "agricultural production legal entity" under the Agricultural Land Act. In the US state of Minnesota, no corporation, limited liability company, pension or investment fund, or limited partnership is allowed to engage in farming or own, acquire, or otherwise obtain an interest in any title to real estate used for farming or capable of being used for farming. Exceptions include family farm corporations, research and experimental farms, and corporate farms that came into existence before 1973.<sup>95</sup>

Maximum size restrictions can limit the danger of enterprises grabbing what is perceived to be an excessive amount of land.<sup>96</sup> One possible solution is to link the maximum amount of land held by a legal entity to the number of members or shareholders of the enterprise. Each shareholder could be allowed to hold a maximum amount of land, and that maximum amount would be multiplied by the number of shareholders. However, no individual could hold or control more than the individual maximum amount of land. French law provides for such a system with its "structural control" over farms. Authorization is required for certain transactions

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<sup>89</sup> IOWA CODE ANNOTATED secs. 567.1, 567.2 (West 1997).

<sup>90</sup> MINNESOTA STATUTES ANNOTATED sec. 500.221 (West 1997).

<sup>91</sup> MISSOURI ANNOTATED STATUTES sec. 442.571 (West 1997).

<sup>92</sup> ILLINOIS COMPILED STATUTES ANNOTATED sec. 50/3 (West 1997).

<sup>93</sup> James R. Mason, Jr., *Psst, Hey Buddy, Wanna Buy a Country? An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 464 (1994).

<sup>94</sup> *Id.* at 467.

<sup>95</sup> MINNESOTA STATUTES ANNOTATED sec. 500.24.3. (West 1996).

<sup>96</sup> See Chapter 6, *Land Use Regulation*.



for the purpose of creating and preserving family farms. Corporations must fall under a fixed threshold, which is determined by multiplying the number of qualified land users under the age of 60 by the amount of land permitted per person.<sup>97</sup>

### **E. Ownership of Grazing Land**

Private ownership systems are unlikely to be appropriate for pasture or grazing land that has been used under a common property regime. However, rights to these common property resources such as pasture or grazing land must be carefully and clearly defined and allocated.<sup>98</sup> Issues to be considered include: who has access to the common resource; what formula will be used to determine appropriations; who has authority to appropriate and regulate use; and what methods will be used to calculate and enforce appropriations regulations.<sup>99</sup> A number of experts agree upon a primary list of design principles useful in addressing these issues and establishing an efficient and sustainable system of common property resource management. These design issues are as follows:

#### **1. Balanced National Policies**

Policy choices regarding resource appropriation must accommodate a variety of potentially competing economic and social objectives at issue in different production systems and agricultural zones.<sup>100</sup> Compromises or trade-offs may be required where national, or central government, objectives regarding the environment conflict with local social or economic realities. In order to effectively govern over resource management, policies at the state or central government level must provide specific guidelines and authority to lower level institutions regarding policy implementation.

#### **2. Local Authority Systems**

Implementation of grazing policies requires efficient institutional management to establish clear rights of access to land, monitor environmentally sound land use, facilitate appropriate involvement in land management, and settle disputes.<sup>101</sup> Many experts agree that institutional management, if not ownership, should be reduced to the lowest reasonable level, especially when governments are weak, because enforcement of management regulations and

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<sup>97</sup> Isabelle Couturier, *Rural Land Law in France* (May 1998) (unpublished manuscript on file with Rural Development Institute). In reality, authorizations are rarely refused. *Id.*

<sup>98</sup> See DANIEL W. BROMLEY & MICHAEL M. CERNEA, *THE MANAGEMENT OF COMMON PROPERTY NATURAL RESOURCES*, (World Bank Discussion Paper no. 57, 1989); CEES DE HAAN ET AL., *LIVESTOCK AND THE ENVIRONMENT: FINDING A BALANCE* 92-94 (1997).

<sup>99</sup> See Bromley, *supra* note 61, at 15-19; STEVEN W. LAWRY, *LAND TENURE, LAND POLICY, AND SMALLHOLDER LIVESTOCK DEVELOPMENT IN BOTSWANA* (Land Tenure Center Research Paper no. 78, March 1983) 49-51.

<sup>100</sup> HENNING STEINFELD ET AL., *LIVESTOCK- ENVIRONMENT INTERACTIONS: ISSUES AND OPTIONS* 46 (1997).

<sup>101</sup> *Id.* at 47.

effective assessment of resource variability requires site-specific animal tallies and land audits.<sup>102</sup> Furthermore, localized institutions tend to be adaptable to social norms and behaviors and more responsive to the economic needs of the communities they govern. Local level institutions are better able to harness local knowledge and foster a sense of responsibility for identifying problems and finding solutions at the local level.<sup>103</sup>

Pastoralist organizations, or peasant enterprises, are able to establish units of resource allocation and utilize authority systems which are oftentimes predefined culturally. These institutions, designed by resource users, limit state or central government management costs over the long term and minimize defiance to regulations formulated externally.<sup>104</sup>

### **3. Clear Legal Access Rights to the Resource**

Legal rules governing access to common property resources must provide user groups with exclusive rights to their allocated portion of the resource in order to minimize damaging, unrestrained competition among resource users. Exclusivity should be structured around identified ownership or management groups with membership in the group and the boundaries of the resource clearly delineated.<sup>105</sup> Allocation of use rights within these groups must also be clearly delineated based upon such factors as individual holdings or seasonal grazing requirements.<sup>106</sup> Grazing rights within defined communities should vary equally amongst individual grazers as seasonal variations in available forage mandate. In many cases, a legal system of rights valuation determines the number of rights, based on forage availability, necessary to graze a particular type of animal (i.e., 2 rights = 1 cow or 3 sheep).<sup>107</sup>

### **4. Audits of Land Conditions and Community Behavior**

Rules establishing active monitoring of the resource can enable appropriators to determine the seasonal capacity and distribution of lands allocated for grazing purposes.<sup>108</sup> Site-specific monitoring also facilitates the assessment of fines and fees based on discrepancies between land use regulations and actual community action. Calculation of stocking rates, dates of resource use, and the specific location of resource extraction are vital to regulation enforcement and are made possible through constant monitoring. Funding for resource

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<sup>102</sup> *Id.* at 31.

<sup>103</sup> *Id.* at 31.

<sup>104</sup> Bromley, *supra* note 61, at 15, 37-39.

<sup>105</sup> *Id.* at 15-19.

<sup>106</sup> See GLENN G. STEVENSON, COMMON PROPERTY ECONOMICS 103-06 (1991).

<sup>107</sup> *Id.*

<sup>108</sup> Steinfeld, *supra* note 100, at 47.

maintenance can also be targeted more appropriately toward degraded land utilizing frequent inventories of the resource. Existing administrative institutional capacity must be carefully considered in developing the rules governing such a monitoring system.

## **5. Participation in Rule-Making Process**

The involvement of resource users, or community members, in determining resource management rules enables lowest level institutions to efficiently implement upper level policies.<sup>109</sup> By synthesizing resource user knowledge with national policies governing resource management, lower level institutions increase the likelihood that appropriation regulations are suitable and will be followed.

## **6. Rapid, Low-Cost Dispute Resolution.**

Rapid, low-cost dispute resolution is necessary in the regulation of pasture land because harmful competition for the resource is inevitable when immediate enforcement of access rights and use regulations is missing. Cost of dispute resolution must remain low because expensive settlement costs can preclude enforcement of regulations by lower income resource users. Disputes must be settled rapidly because the fragility of the marginal grazing lands makes it readily susceptible to damage, jeopardizing the future of users with small holdings.

Lower level institutions can facilitate rapid, low-cost dispute resolution based on the proximity of the administrative body and the familiarity of local officials with local custom.<sup>110</sup> The number of disputes can diminish if the regulations formed at the local level more accurately reflect customary interactions. Increased accountability in local institutions can provide a self-policing mechanism in which resource users actively pressure those in violation of land use regulations into conformity.<sup>111</sup>

## **7. Management Tools**

### **a. Fines and Sanctions**

Legal rules allowing graduated fines and sanctions imposed by appropriators, or officials accountable to appropriators, provide a necessary economic deterrent to the grazing of animals in excess of allotted grazing rights.<sup>112</sup> Fines assessed at the local level enable assessors to tailor sanctions or fine amounts according to site-specific damage. Additive fines and sanctions can provide an effective deterrent mechanism if the economic incentive to violate regulations

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<sup>109</sup> See Bromley, *supra* note 61, at 27-39.

<sup>110</sup> *Id.* at 31-34.

<sup>111</sup> STEVENSON, *supra* note 106, at 135-36.

<sup>112</sup> *Id.* at 125, 26.

decreases with the extent of the violation and the true cost of grievous violations to the resource is reflected in the growth of the fine.<sup>113</sup>

#### **b. Fees and Taxes**

Use fees or land taxes are often necessary to provide for the basic infrastructure of land management, and can potentially be used as a tool in deterring the addition of animals to the common resource. Fees are typically based on the number of animals grazed or grazing rights held. In many developed countries, fees are insufficiently low to function as an effective deterrent, but they can provide for a minimal amount of management funding.<sup>114</sup>

#### **c. Alternative Mechanisms**

In cash-poor economies, work duties or other methods of direct resource maintenance can replace fees or taxes.<sup>115</sup> These methods commonly calculate a number of hours or days of maintenance required of each resource user based upon either the number of animals grazed or simply by virtue of resource use.<sup>116</sup> Utilizing the labor of resource users in maintenance of the resource may be more cost-efficient than funneling money through management agencies and potentially instill a greater sense of stewardship among resource users.

A village in Switzerland provides one successful model for management of common property resources.<sup>117</sup> As early as 1483, the village law specifically forbade foreigners from acquiring any right to the locally controlled common property resources. The inhabitants currently possessing land and water rights reserved the power to decide whether an outsider could be a member of the community. Later regulations determined how use rights to pasture land would be allocated to the citizens of the village. The law provides that citizens could not send more cows to the common grazing area than they could feed during the winter. Substantial fines are levied against anyone who tries to appropriate a larger share of grazing rights. All the citizens of the village participate in voting on village statutes. An association manages the land and the association is made up of all local citizens who own cattle. The association elects officials who hire staff, impose fines for misuse of the common property, arrange for distribution of manure on the summer pastures, and organize annual maintenance work. Labor contributions and fees related to the use of the meadows are usually set in proportion to the number of cattle sent by each owner.

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<sup>113</sup> *Id.*

<sup>114</sup> See STEVENSON, *supra* note 106, at 125-26; Steinfeld, *supra* note 100, at 32-33.

<sup>115</sup> *Id.* at 126-27.

<sup>116</sup> *Id.*

<sup>117</sup> ELINOR OSTROM, *GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 61-65 (1991).

In some Swiss villages, other allocation limits are enforced. They might include: (a) the amount of meadowland owned by a farmer; (b) the actual amount of hay produced by a farmer; (c) the value of the land owned in the valley; or (d) the number of shares owned in a cooperative. In most Swiss villages, those who allocate use rights are those who use the land. In other words, there is a large degree of self-governance.

The system of grazing land management in the United States illustrates the potential management problems associated with central government-level common property resource ownership and management. In the United States, the federal government owns public domain land that is made available for grazing. The majority of this land is managed by the Department of Interior's Bureau of Land Management (BLM), a federal agency. BLM's authority to manage federal grazing lands arose from the Taylor Grazing Act of 1934 and has since been extended by a string of environmental statutes aimed at rangeland ecology and management. The BLM manages approximately 73 million hectares of land in eleven western states. In 1991, 19,482 livestock grazers were authorized by the BLM to use about 69 million hectares of BLM land.<sup>118</sup>

Grazing on federal lands is based upon a system of permit allocation. Ranchers receive permits which are priced based upon the number of animal unit months (AUMs) they allow. AUMs represent the amount of feed required to feed the equivalent of one cow for one month.<sup>119</sup> The federal fee per AUM was lowered to \$1.35 per AUM in 1996. Many ranchers hold lease-like rights called "grazing preferences," which ensure them a preference over third parties for allocation of future grazing permits. To obtain a grazing preference, the lessee/grantee must own or control "base property" that is capable of supporting the grazed livestock for a specified period of the year or that provides water for livestock consumption when the public lands are used for grazing.<sup>120</sup> Because these public grazing lands are located primarily in the arid US west, they produce relatively little forage per unit of land. Forage consumed on public lands represents only two percent of all US beef cattle forage consumed.<sup>121</sup> Ninety percent of AUMs on public lands are held by corporations or "hobby ranchers."<sup>122</sup>

The federal lands and grazing policy of the United States is often criticized as an unnecessary subsidy of corporate ranchers effectively promoting overgrazing of the resource and

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<sup>118</sup> Bruce M. Pendry, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 *Northwestern School of Law (of Lewis & Clark College) JOURNAL OF ENVIRONMENTAL LAW* 513, 522-23 (1997).

<sup>119</sup> Todd M. Olinger, *Public Rangelands Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 *UNIVERSITY OF COLORADO LAW REVIEW* 633, 636 (1998).

<sup>120</sup> Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: the Historical Development of Western Grazing Rights*, 30 *IDAHO LAW REVIEW* 505, 507 (1993-94).

<sup>121</sup> Olinger, *supra* note 119, at 636.

<sup>122</sup> Gary C. Bryner, *U.S. LAND AND NATURAL RESOURCES POLICY* 154 (1998).

providing little benefit to the taxpayer.<sup>123</sup> BLM's authority to manage the nation's grazing lands stems from a series of laws which provide it with little guidance as to how to implement and enforce guidelines. The sheer size of BLM lands precludes it from creating an accurate inventory of its resources. As a result, the BLM establishes stocking rates and allocates lands based upon data which lacks sufficient detail to facilitate meaningful site-specific regulation. The grazing fees imposed by the BLM are estimated to be as little as one-fifth of their true market value and, once all aspects of land management are factored in, the entire subsidy to the recipients of grazing permits approaches \$200 million.<sup>124</sup> This number exceeds the total profits of ranchers using public lands by 10 to 20 percent.<sup>125</sup> Management tools, such as sanctions and fees, are ineffective in the centralized management system of the BLM because the agency cannot maintain accurate tallies of animal numbers or make meaningful audits of land quality.

#### **IV. Checklist of Potential Legal Impediments and Solutions**

This section, based upon the discussion in the previous sections, outlines a checklist of legal impediments relating to land ownership in ECA countries and potential solutions which may be considered in addressing such impediments.

##### **Potential Impediment: Private ownership of land is prohibited.**

Private ownership of land is either prohibited outright or many, if not all, of the rights commonly associated with private ownership are prohibited.

##### **Potential Solutions**

- Allow for private ownership of agricultural land in the constitution and land legislation. Provide in law for secure land tenure,<sup>126</sup> the right to sell land for a negotiated price, and the right to lease, mortgage, and pass by gift and inheritance.<sup>127</sup>
- Allow for long-term use rights of government-owned or communally owned land with secure land tenure and rights to transfer and mortgage. The specific rights embodied by these use rights should parallel the rights that private owners normally would have.

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<sup>123</sup> *Id.* at 163-172.

<sup>124</sup> Olinger, *supra* note 119, at 639.

<sup>125</sup> *Id.*

<sup>126</sup> See discussions on necessary requirements for secure land tenure and potential impediments in Chapter 6, *Land Use Regulation* and Chapter 11, *Compulsory Acquisition*.

<sup>127</sup> See discussion of transaction rights, including potential legal impediments and solutions in Chapter 7, *Land Transactions*.

- If support for prohibition of private ownership centers on real or perceived dangers of foreign ownership of land or agricultural land, place appropriate restrictions or even prohibitions on foreign ownership.
- Provide for clear legal rules governing the ownership of subsoil rights. If the state retains subsoil rights to privatized land, the law should specify the kind of compensation to be paid to the private landowner if the state or a third party exploits subsoil rights in such a way as to interfere with use of the surface.

**Potential Impediment: Enterprises are prohibited from owning land.**

Agricultural enterprises that cannot own land cannot participate fully in the land market.

**Potential Solutions**

- Set maximum land sizes for enterprise land ownership based on the number of individual members in the enterprise, but not allowing individual members to hold more than a defined share.
- Allow unrestricted ownership of agricultural land by enterprises.

**Potential Impediment: Enterprises that have the right to own land in transition economies may coerce members to contribute land to the charter capital of the enterprise.**

Agricultural enterprises that have the right to own land may be able to force small, newly created landowners into contributing their land share rights to the charter capital of the enterprise without the right to later withdraw land in kind.

**Potential Solutions**

- Forbid irrevocable capital contributions of land while allowing short-term contributions such as lease rights.
- Institute a two-three year moratorium on irrevocable capital contributions of land after land shares have been issued.
- Allow irrevocable capital contributions of land with safeguards. These safeguards could include allowing bilateral but not multilateral transactions, a warning on the standard contribution contract, and a requirement that the contract be notarized.

**Potential Impediment: Common ownership rules may be misapplied to land shares held in common ownership.**

Land shares represent a small portion of land held in common with a large number of people. Common ownership rules designed for married couples, families, or other small groups of common owners are not appropriate for land shareowners.

#### **Potential Solution**

- Provide alternative rules for land shareowners in the Civil Code or land legislation specifying that individual land shareholders have the right to sell, lease, and give their land shares to others without the consent of any of the other members. Such rules should also provide that land shareholders have the right to withdraw their land share in kind without the consent of other common owners.

**Potential Impediment: Legal rules governing common property resources have not yet been developed or have been “over-privatized.”**

State or group ownership regimes are likely to be more viable than private ownership for large-scale common property resources such as pasture land. Ownership, management, and use rights to such land must be clearly and specifically defined and allocated in law.

#### **Potential Solutions**

- Avoid, or at least proceed cautiously, in introducing private ownership rights to common property resources.
- Design legal ownership and use rules for common property resources which incorporate the following:
  1. Clearly defined boundaries;
  2. Clearly defined rightholders;
  3. Congruence between appropriation rules and local conditions;
  4. Participation in governance by individuals affected by the rules;
  5. Monitors who actively audit the conditions of the land and the behavior of the community;
  6. Graduated sanctions imposed by other appropriators or by officials who are accountable to appropriators or both;
  7. Rapid access to low-cost conflict resolution; and
  8. Rights of appropriators to devise their own institutions unchallenged by external governmental authorities.



## Chapter 3

# Land Privatization

by Leonard Rolfes, Jr.

### I. Introduction

This chapter examines the continuing legal barriers to agricultural land privatization found in ECA countries, and offers experience from developed market economies in an effort to find solutions.

As an introductory matter, the term "land privatization" has been used to describe a wide range of processes in ECA countries, some of which do not result in any significant transfer of land rights to private parties. A meaningful definition of the term is as follows: a transfer, from the state to private parties, of land rights which are the functional equivalent of full ownership. These rights include: permanent or long-term rights of possession; freedom to decide on the use of a land plot, subject to reasonable land use regulation; and freedom to sell, lease, pass by inheritance, and conduct other transactions with the land.

For land in ECA countries that can be characterized as privatized according to this definition, privatization generally has meant the transfer of permanent, transferable ownership rights; in some cases privatization has meant the transfer of long-term, alienable use rights. However, if such land rights are transferred to large agricultural enterprises, or to a group of individuals without those individuals receiving corresponding rights to freely transfer or withdraw the land in-kind from the group, the transfer does not represent any meaningful privatization.

While many legal barriers to land privatization continue to exist, it should be noted that much land has already been privatized in ECA countries. In Hungary 81% of productive agricultural land is privately owned.<sup>1</sup> In Poland, which continued to have privately-owned farms under communist rule, 76% of agricultural land was already privately owned at the start of the reform process.<sup>2</sup> The Kyrgyz Republic has privatized a substantial majority of its plowed land.<sup>3</sup>

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<sup>1</sup> Csaba Csaki & Zvi Lerman, *Land Reform and Farm Restructuring in Hungary During the 1990s, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE 237* (Stephen K. Wegren, ed., 1998) [hereinafter *Land Reform*].

<sup>2</sup> *Tension Grows on Farming Issues*, THE FINANCIAL TIMES LIMITED, April 6, 1990, available in LEXIS.

<sup>3</sup> Interview by Kathryn Rasmussen (Field Director, Citizens' Network for Foreign Affairs, Bishkek, Kyrgyz Republic) with Kachkynbai Kadyrkulov, Head of the Republican Center for Land and Agrarian Reform of the

Additionally, 58% of Russia's plowed land has been privatized.<sup>4</sup> However, in Russia, the Kyrgyz Republic, and some other ECA countries, most of the privatized agricultural land has been privatized under a "land share" system, in which a large majority of the private owners still hold their rights in common, with some form of right to separately partition land in kind, but without having exercised that right.<sup>5</sup> At the same time, several ECA countries have chosen to retain a large portion of land in state or group (collective) ownership. Uzbekistan,<sup>6</sup> Turkmenistan,<sup>7</sup> and Belarus<sup>8</sup> serve as examples.

Finally, genuine privatization of agricultural land (or in some cases, of any land) is often an ideological issue on which groups of political actors in some ECA countries are determined to maintain legal and administrative barriers, regardless of the ease of removing those barriers or the cost to their country's development process of not removing them. The price paid by their societies for up to two generations of state ownership of the land has been so enormous that the error, for some, is psychologically inadmissible: they are "in denial." Clearly there is little that this chapter can offer that will deal with these impediments, where they exist.

## **II. Legal Issues Relating to Land Privatization in ECA Countries**

### **A. Prohibition of Private Land Ownership**

For land to be transferred from state or group ownership to private ownership, the relevant constitution and legislation must provide for private ownership, or at least not prohibit it.

Some ECA countries prohibit private ownership of land. The Belorussian Constitution provides that "[l]and of agricultural designation is located in the ownership of the state."<sup>9</sup> Until an October 17, 1998 public referendum, the Constitution of the Kyrgyz Republic stated that

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Kyrgyz Republic (June 1998), as communicated by Ms. Rasmussen to the Rural Development Institute. Mr. Kadyrkulov asserts that land share certificates have been issued for 86% of the plowed land in the country.

<sup>4</sup>State Committee of the Russian Federation on Land Resources and Land Management (1996) [hereinafter Land Committee] (material on file with the Rural Development Institute).

<sup>5</sup> If no right to separately partition in kind existed, the form of ownership would be more properly regarded as group rather than private ownership.

<sup>6</sup> Land Reform, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> CONSTITUTION OF THE REPUBLIC OF BELARUS art. 13.

<sup>9</sup> *Id.*

"land . . . shall be the property of the state."<sup>10</sup> The law approved by the referendum amended that language to read that "land . . . may be under private, state, communal, and other forms of ownership."<sup>11</sup> The Uzbek Constitution is ambiguous on the issue, providing that "[t]he land . . . shall constitute the national wealth, and shall be rationally used and protected by the state."<sup>12</sup> Does this mean that the state shall only protect land, or that it will both use and protect land? At the very least, this constitutional provision casts doubt on the ability to transfer land into private ownership.

Even without full private ownership, however, it is possible to allocate long-term, transferable private rights that may provide a substantial equivalent of private ownership. For example, in the Kyrgyz Republic a 1994 presidential decree gave citizens 49-year use rights to agricultural land shares, with priority right of renewal.<sup>13</sup> The land shares could be separately partitioned in kind. The decree further provided that these use rights could be transferred by sale, exchange, bequest, pledge and lease, and prohibited state interference in exercise of the rights.<sup>14</sup> The 49-year use rights were extended to 99 years in 1995.<sup>15</sup>

## **B. Transfer of Less than Full Ownership or "Owner-Like" Rights to Private Parties**

An important issue when discussing privatization of land is whether rights being officially transferred are the functional equivalent of ownership. Do the land rights transferred to private economic actors embody the full "bundle of rights," including the right to possess land free from the threat of the government taking the land back except in exceptional circumstances; to choose how to use that land within use-purpose and zoning regimes; and to lease, sell, give, mortgage, or otherwise alienate the land as the possessor sees fit? Or is a set of rights somewhat less than full ownership being allocated to private control?

In some cases, the rights to be transferred are falsely characterized as "ownership" rights when they are not. Two examples from draft legislation in Russia illustrate the issue. First, the draft "Land Code" adopted by the Federal Assembly in 1997 (and subsequently vetoed by

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<sup>10</sup> CONSTITUTION OF THE KYRGYZ REPUBLIC art. 4. On October 17, 1998 a public referendum was held on, among other issues, whether to amend the Constitution to allow for private ownership of land. The majority of voters supported this amendment.

<sup>11</sup> Law of the Kyrgyz Republic "On the Introduction of Changes and Amendments to the Constitution of the Kyrgyz Republic," sec. I(1) (1998).

<sup>12</sup> CONSTITUTION OF THE REPUBLIC OF UZBEKISTAN art. 55.

<sup>13</sup> Decree of the President of the Kyrgyz Republic No. 23 "On Measures to Enhance (Deepen) Land and Agrarian Reform in the Kyrgyz Republic" (1994).

<sup>14</sup> *Id.*

<sup>15</sup> Decree of the President of the Kyrgyz Republic No. UP-297 "On Measures for Further Development and State Support of Land and Agrarian Reform in the Kyrgyz Republic" (1995).

President Yeltsin) purports to authorize private ownership to agricultural land.<sup>16</sup> However, the Code goes on to effectively prohibit transactions in such land.<sup>17</sup> The draft Code particularly assails ownership rights of private farms, both by prohibiting sale of private farm land that was originally taken from a collective farm,<sup>18</sup> and by requiring the return of other land held in private ownership to the government if the private farm ceases operations.<sup>19</sup> Such provisions make a mockery of the term ownership.

Second, the draft federal law of June 1998, "On State Regulation and Specifics of Limited Turnover of Land of Agricultural Designation," speaks of allowing private ownership, but then goes on to ban owners of private land from selling that land for 10 years after acquisition, except with government permission.<sup>20</sup> Ownership in this context is, once again, meaningless.

In other cases rights are transferred to private parties that are different from, and substantially less than, full ownership. Such transfers effectively lock up land in the use of one party, preventing that land from being transferred to more willing or efficient users as circumstances change and opportunities arise. Several examples can be seen in ECA countries.

For example, in Russia much land was allocated to private farmers in "lifetime inheritable possession."<sup>21</sup> This form of tenure gives the holder lifelong use rights to the land. These use rights can be leased and passed by inheritance, but cannot be sold, given away, mortgaged, or otherwise alienated.<sup>22</sup> In addition, the lease right is often illusory, since it is often restricted by special laws.<sup>23</sup> Finally, the state retains ultimate ownership of the land, and a level of tenure insecurity therefore exists. This continuing government role may have a chilling effect on recipients who have seemingly lifetime land rights.

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<sup>16</sup> Draft Land Code of the Russian Federation, arts. 46, 48 (1997).

<sup>17</sup> *Id.*, arts. 83, 87.

<sup>18</sup> *Id.* art. 104(3).

<sup>19</sup> *Id.* art. 106.

<sup>20</sup> *Id.* art. 11.

<sup>21</sup> See Law of the R.S.F.S.R. "On the Peasant (Farm) Enterprise," art. 5. (1990). This article was invalidated by Decree of the President of the Russian Federation No. 2287 "On Bringing the Land Legislation of the Russian Federation into Conformity With the Constitution of the Russian Federation" (December 24, 1993).

<sup>22</sup> CIVIL CODE OF THE RUSSIAN FEDERATION, arts. 266, 267 (1994). These articles are part of Chapter 17 of the Civil Code, which does not go into effect until the Land Code is adopted. Federal Law of the Russian Federation "On Introduction into Operation of Part One of the Civil Code of the Russian Federation," art. 13 (November 30, 1994).

<sup>23</sup> Law on the Peasant (Farm) Enterprise, *supra* note 21, art. 10. Article 10 allows lease of a land plot held in lifetime inheritable possession only if the holder is temporarily incapacitated, in school, or is called up for military service.

In Uzbekistan as well, agricultural land is allocated to individual users in lifetime inheritable possession.<sup>24</sup> Transactions in land are therefore not possible.

In Belarus agricultural land is allocated to cooperatives, companies, and other large agricultural enterprises -- collective-style groups rather than private individuals -- and even then only in permanent use.<sup>25</sup> Alienation of such land is not possible.

In Albania, while agricultural land on collectivized farming cooperatives has been distributed in ownership, land on state farms was not privatized, but was distributed "in use."<sup>26</sup> This latter form of tenure does not provide "any clear delineation of the rights and responsibilities of either the land users or the government."<sup>27</sup>

A somewhat similar process was undertaken in Hungary, where the land of state farms remains government property, and is leased to the new operators for 10-15 years with an option to buy.<sup>28</sup> This land is being retained by the state until the end of the restitution process, since the land has been and may be used for compensation.<sup>29</sup>

### C. State Land Funds

Several ECA countries have established different types of land funds, which serve different purposes. Unfortunately, in many situations these land funds continue to hold land in state ownership that cannot be privatized.

In the Kyrgyz Republic, the National Land Fund was created at the beginning of the reform process in order to supply irrigated farmland to the ethnic Kyrgyz.<sup>30</sup> Although the National Land Fund was subsequently abolished and its land transferred to a more general land

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<sup>24</sup> Law of the Republic of Uzbekistan "On Land," arts. 20, 27 (1990).

<sup>25</sup> LAND CODE OF THE REPUBLIC OF BELARUS art. 7.

<sup>26</sup> Peter C. Bloch, *Picking Up the Pieces: Consolidation of Albania's Radical Land Reform*, in Land Reform, *supra* note 1, at 193-94.

<sup>27</sup> *Id.* at 194.

<sup>28</sup> *Id.* at 246.

<sup>29</sup> *Id.*

<sup>30</sup> Decree of the President of the Kyrgyz Republic No. VII-369 "On Urgent Measures to Secure the Realization of the Laws of the Kyrgyz Republic Regulating Land Relations and Other Relations in Agriculture" (November 10, 1991).

fund,<sup>31</sup> the land continued to languish in state control and was used by agricultural producers through short-term lease only. Only in late 1996 did the Kyrgyz government issue a directive to sell long-term use rights to 50% of the land in the land fund by March 1, 1998.<sup>32</sup> This deadline was not met, though the sales are underway.<sup>33</sup>

In addition, roughly 7% of Russia's plowed land is retained in state ownership in land redistribution funds.<sup>34</sup> This land remains in state ownership because, at least in Russia, many users of land fund land have already received land in private ownership free of charge from the government. Thus, giving ownership to additional land from the land fund could be seen as an unjustified windfall. However, to the extent that a significant portion of this land is already in use by private parties (usually through leasehold or lifetime inheritable possession), any perceptions of windfall could be eliminated by requiring use for a period of time before transfer into ownership. Such an approach is taken in the Ukrainian law "On Peasant (Private) Farming," which allows a citizen to receive ownership of a land plot after that plot has been possessed in a lesser form of tenure for six years.<sup>35</sup>

#### **D. Land Exempt From Privatization**

The law in some ECA countries exempts certain lands from privatization. For example, Russian law exempts the land of many former collective and state farms which is used for activities such as specialized animal and plant breeding and seed growing.<sup>36</sup> These farms occupy 30% of Russia's plowed land.<sup>37</sup> Rural Development Institute field research has found that these

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<sup>31</sup> Decree of the President of the Kyrgyz Republic "On Measures for Further Development and State Support of Land and Agrarian Reform in the Kyrgyz Republic" (November 3, 1995).

<sup>32</sup> Decree of the President of the Kyrgyz Republic No. OI-327 "On Measures Aimed at Introduction of Market of Land Use Rights and on Establishment of the Market Credit System in Agriculture" (November 25, 1996).

<sup>33</sup> Interview by Rural Development Institute staff attorney Renee Giovarelli with Kachkynbai Kadyrkulov, Head of Republican Center for Land and Agrarian Reform of the Kyrgyz Republic, Bishkek, Kyrgyz Republic (March 1998).

<sup>34</sup> Land Committee, *supra* note 4.

<sup>35</sup> Law of the Republic of Ukraine "On Peasant (Private) Farming," art. 5 (1991).

<sup>36</sup> Resolution of the Government of the Russian Federation No. 708 "On the Procedure for Privatization and Reorganization of Enterprises and Organizations of the Agro-Industrial Complex," secs. 20-23, 26 (September 4, 1992), *amended by* Resolution of the Government of the Russian Federation No. 969 (December 11, 1992); Decree of the President of the Russian Federation No. 1767 "On Regulation of Land Relations and Development of Agrarian Reform in Russia," sec. 5 (October 27, 1993).

<sup>37</sup> Land Committee, *supra* note 4.

exemptions have been broadly interpreted by regional authorities to exclude from privatization enterprises that are only partially, or even only marginally, engaged in the indicated activities.<sup>38</sup>

Under Hungarian law, 26 agricultural enterprises, which use 14% of all agricultural land, remain in state ownership as the supposed core of the integrated production system.<sup>39</sup>

In Estonia, all agricultural land privatization has been conducted under the auspices of the restitution program. Land not subject to restitution claims presently remains in state ownership; this land amounts to 50% of all agricultural land in the country.<sup>40</sup> This land is to be privatized at the discretion of local authorities.<sup>41</sup> Little progress has been made to date.

Legitimate reasons exist for some government ownership of agricultural land, such as for conducting research. However, these needs typically require only a very small fraction of the total agricultural land base.

### **E. Regional and Local Government Revenue Issues and Land Privatization**

The need for land privatization can sometimes collide with the revenue needs of regional and local governments, or at least be perceived to collide with these needs. In many ECA countries these governments have few sources of independent revenue, relying instead on federal allocations to carry out their functions.

Regional and local governments often have little direct incentive to support privatization of land if they do not receive meaningful revenue from such privatization. The lack of meaningful revenue can be for differing reasons, such as required sharing of privatization revenues with the federal budget, or because land is to be transferred to private ownership free of charge. The fact that privatized land should significantly enhance local and regional tax bases over time by spurring increased productivity and agricultural development often does not sway governments dealing with ongoing budgetary problems.

Russia's Saratov *Oblast* provides an example of what is possible if local governments are legally ensured sufficient revenue from land privatization. Saratov adopted its provincial law

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<sup>38</sup> BRADLEY ROREM & RENEE GIOVARELLI, AGRARIAN REFORM IN THE RUSSIAN FAR EAST 22-23 (Rural Development Institute Reports on Foreign Aid and Development #95, October 1997) (on file with the Rural Development Institute).

<sup>39</sup> *Agricultural Companies to Remain in State Property*, MTI HUNGARIAN NEWS AGENCY, February 25, 1998, available in LEXIS.

<sup>40</sup> THE WORLD BANK, ESTONIA AGRICULTURAL AND FORESTRY POLICY UPDATE 9 (EC4NR AGRICULTURE POLICY NOTE #10, February 26, 1997).

<sup>41</sup> *Id.*

"On Land" in November of 1997.<sup>42</sup> The regulations accompanying the law allow local administrations to auction off ownership or lease rights to land that they own, with the local administrations keeping all revenue from the auction.<sup>43</sup> Saratov's local administrations have carried out 68 land auctions as of early October 1998, at which 436 parcels of land (including 53 parcels of agricultural land) have been privatized.<sup>44</sup> While these 53 parcels (encompassing 2,452 hectares) were sold for a seemingly meager sum of 510,000 rubles (roughly \$75,000),<sup>45</sup> this still represents revenue to local administrations where none would have been otherwise obtained, and is a step forward in light of the fact that market prices are unclear and the market itself is just beginning to function.

In addition to the 68 land auctions that have been held in Saratov *Oblast*, an auction of Saratov land was held in Moscow on October 30, 1998.<sup>46</sup> This auction represents yet another step in the process of developing the land market, and should help local budgets in Saratov as well.

#### **F. Confusion over which Level of Government Controls Land Subject to Privatization**

One possible impediment to land market development in ECA countries is a lack of legal clarification concerning which level of government controls land subject to privatization. During the land privatization process in ECA countries in the 1990's, the process of determining ownership of land among federal, regional, and local levels of government was often muddled. Privatization and land laws often provided for distinctions between federal, provincial, local, or municipal ownership of land, but what level of government controlled a particular parcel of land was sometimes difficult to ascertain.<sup>47</sup>

This lack of clarity has an impact on the ability to privatize land for two main reasons: (a) if the "owner" of land, who by right of ownership would have the right to decide to privatize land, cannot be determined, then land lingers in undefined government ownership; (b) if a land plot is privatized by a government body with unclear ownership or authority to do so, the newly-

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<sup>42</sup> Law of the Saratov *Oblast* of the Russian Federation "On Land" (1997).

<sup>43</sup> See Provisions "On Tenders and Auctions to Sell Land Plots," sec. 4, approved by the Saratov *Oblast* Committee on Land Resources and Land Management Order No. 2-P (January 23, 1998) (Russian Federation). See also Resolution of the Government of the Russian Federation No. 2 "On Establishing the Procedure for Organizing Sales (Auctions, Tenders) to Sell Land Plots Located on the Territory of Urban and Rural Settlements, or the Rights of Lease Thereof, to Individuals and Legal Entities" (January 5, 1998).

<sup>44</sup> Committee on Land Resources and Land Tenure of Saratov *Oblast*, Saratov, Russia (October 1998).

<sup>45</sup> *Id.*

<sup>46</sup> Vladimir Demchenko, *Saratov Oblast Is Auctioned Off*, IZVESTIA, October 31, 1998.

<sup>47</sup> See generally Law of the Russian Federation "On State and Municipal Lands" (1998).



granted tenure rights have a degree of uncertainty attached to them, which could impact the plot's marketability or result in the plot being taken back by a different level of government at some future time.<sup>48</sup>

### **G. Impact of Restitution Policy on Privatization**

The issue of restitution has been a significant component of the privatization landscape in the ECA countries of East-Central Europe and the Baltics. While some ECA countries have opted to financially compensate landowners whose land was unjustly taken by the previous communist governments, others have chosen to physically return land holdings to their pre-communist owners.<sup>49</sup> The process for doing so, however, has often been complex and time consuming.

Estonia provides an example of the difficulties surrounding restitution and privatization. In the Law on Principles of Property Reform, Estonia adopted the policy of physical restitution of land.<sup>50</sup> However, due to the complicated procedures as well as to the lack of resources of local governments for the task, only about 10% of the restitution claims had been fully adjudicated as of 1996. In addition, it is estimated that 50% of Estonia's agricultural land will still be in state ownership after restitution is completed, but it seems that restitution claims are holding up the privatization of this land as well.<sup>51</sup> **Chapter 4, Land Restitution**, discusses the major difficulties in the restitution process.

While implementation of restitution has resulted in difficulties, the issue of restitution is politically very charged, thus the likelihood that the restitution policies of ECA countries will be significantly amended is low.

## **III. Relevant Experience on Land Privatization in Developed Market Economies**

### **A. Levels of Private Land Ownership**

Developed market economies address this impediment in a straightforward way: private land ownership is allowed and encouraged, and is the basis for agricultural production. The vast

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<sup>48</sup> See generally Gennadii A. Volkov, Legislative Regulation of the Right of State Ownership to Natural Resources (1996) (unpublished paper on file with the Rural Development Institute); APRIL L. HARDING, COMMERCIAL REAL ESTATE MARKET DEVELOPMENT IN RUSSIA (CFS Discussion Paper Series, No. 109, The World Bank, July 1995).

<sup>49</sup> The countries which have chosen to physically restore land holdings include the Czech Republic, Slovakia, Estonia, Latvia, Lithuania and Bulgaria. See generally Anna Gelpert, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL BUSINESS LAW 315 (1993).

<sup>50</sup> ESTONIA AGRICULTURAL AND FORESTRY POLICY UPDATE, *supra* note 40, at 8, 9.

<sup>51</sup> *Id.*

majority of arable land in market economies is privately owned, as shown in the following examples:

Country	Percentage of Plowed Land in Private Ownership
United States <sup>52</sup>	98%
Germany <sup>53</sup>	99%
Japan <sup>54</sup>	99%
Italy <sup>55</sup>	93%
France <sup>56</sup>	91%

## B. Productive Land in Government Ownership

In rare situations a significant amount of productive land is owned by governments or quasi-governmental agencies in developed market economies, but these governments allocate long-term, transferable use rights to private parties. Israel is a leading example. The State of Israel, its Development Authority, and the Jewish National Fund together own roughly 92% of the land in Israel. These public lands may not be sold to private individuals, but are leased to them for periods of up to 99 years, with the maximum lease period recently extended to 196 years. Israel's agriculture is almost entirely based on the principle of public land under transferable leasehold.

Hong Kong is another example. Before the transfer of Hong Kong to Chinese control in 1997, all of Hong Kong's land was owned by the British government and sold on leasehold.<sup>57</sup> The leases were sold to the highest bidder at public auction; more recent leases were generally sold for 75 year terms, usually renewable for a further 75 years.<sup>58</sup> These leases were fully

<sup>52</sup> UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LANDS STATISTICS: 1992 (1992).

<sup>53</sup> Federal Office of Statistics, published in *Land und Forstwirtschaft, Fischerei, Fachserie 3, Reihe 2.1.2 Bodennutzung der Betriebe*, S. 30, 31 (1995) (Germany). In addition, this figure does not technically represent the amount of private land, but the amount of privately managed land. It is fair to assume that the overwhelming majority of this land is privately owned, after factoring out the land undergoing transition in the former G.D.R..

<sup>54</sup> Isoshi Kajii, *Rural Land in Japan* (May 1998) (unpublished manuscript on file with Rural Development Institute).

<sup>55</sup> GENERAL AGRICULTURAL CENSUS OF 1990 (Italy), as cited in Danilo Agostini, *Rural Land Law in Italy* (May 1998) (unpublished manuscript on file with Rural Development Institute).

<sup>56</sup> Isabelle Couturier, *Rural Land Law in France* (May 1998), (unpublished manuscript on file with Rural development Institute). Information based on statistics from 1993. This 91% figure represents the percentage of agricultural land owned by households. The remaining nine percent of the agricultural land is owned by legal entities or the state in an undetermined proportion. *Id.*

<sup>57</sup> ROGER BRISTOW, *LAND USE PLANNING IN HONG KONG* 160 (1984).

<sup>58</sup> *Id.*

transferable between private parties,<sup>59</sup> and cancellation of the leases by the government had to be fully compensated.<sup>60</sup>

### **C. Methods of Privatization**

One likely policy reason for failing to fully privatize certain land is that the users of such land have often already received other land in ownership free of charge; an additional free transfer would be a windfall. Some level of compensation, or at least good faith intention to farm, may address the policy concern.

The United States provides one approach for consideration. Under the Homestead Act of 1862, a settler could receive up to 160 acres (about 65 hectares) of public land free of charge. The settler received title to the land only after living upon or cultivating the plot of land for five years.<sup>61</sup> The Homestead Act resulted in tens of millions of acres of public land being transferred to the ownership of individuals.<sup>62</sup>

### **D. Land Management and Protection**

The need to properly manage and protect land is one justification for retaining state ownership. However, developed market economies almost universally address these concerns by applying zoning and land use legislation to private land, rather than proscribing privatization. Thus, the advantages of private land ownership are gained while still meeting legitimate public concerns. See **Chapter 6, Land Use Regulation**.

### **E. State Agricultural Production**

Two main policy considerations seem to drive the failure to privatize certain units of arable land in ECA countries. They are: a continuing belief that the government has a legitimate, direct role to play in primary agricultural production; and continued government operation of specialized farms that meets broader commercial production needs (such as cattle breeding and seed producing entities). It is believed that these latter needs will somehow not be met in the absence of government action.

As shown in the table in Section III.A above, virtually all arable land is in private hands in developed market economies. Governments in market economies play a supporting role

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<sup>59</sup> Crown Lease Ordinance, Laws of Hong Kong, CAP 40, Issue 13.

<sup>60</sup> See Crown Land Resumption Ordinance, Laws of Hong Kong, CAP 124, Issue 9.

<sup>61</sup> An Act to Secure Homesteads to Actual Settlers on the Public Domain [The Homestead Act], sess. II, ch. 75, secs. 1,2 (May 20, 1862).

<sup>62</sup> See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 799 (1968).

through extension services and research, but do not conduct farming operations themselves. Nor should they since, by all measures, private actors in a market setting are better able to use land effectively, including through transferring it to more effective private actors as needed.

## **F. Local Government Revenue**

In countries with developed market economies, local governments have adequate sources of revenue, so that they do not need to raise revenue in ways that seriously impair land market activity. One of the most important local sources of revenue is the authority to tax land and buildings. See **Chapter 10, Land Taxation**.

## **G. Restitution**

Market economy experience with physical restitution is limited to eastern Germany, which has encountered many of the same difficulties encountered in the ECA countries. The Vermögensgesetz (law of wealth) provides for the return of land on the territory of the former German Democratic Republic (G.D.R.) to its previous owners without compensation or with little compensation, except for land expropriated between 1945 and 1949 on the basis of Soviet occupation law or authority.<sup>63</sup> The restitution process has been slow due to: the difficulties in identifying and surveying land plots subject to claims; and conflicting claims for the same land parcel.<sup>64</sup> Additionally, many land plots that were not subject to active claims were subject to potential claims, and thus could not be sold off until such claims were resolved.<sup>65</sup> As a result, of the roughly six million hectares of arable land in the former G.D.R., approximately 1.3 million hectares still remain to be privatized.<sup>66</sup>

## **H. Delineation of State Land Among Levels of Government**

As discussed in Section II, a potential legal impediment to land privatization is the lack of legal clarity over which level of government has control over land. Relevant market economy experience with this issue can be seen with the allocation of land in the State of Alaska among the federal government, state government, and native Alaskan groups.

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<sup>63</sup> Gesetz zur Regelung offener Vermögensfragen, v. 29.3.1991 (BGBl. I S.957) sec. 1. See generally Jonathan J. Doyle, *A Bitter Inheritance: East German Real Property And The Supreme Constitutional Court's "Land Reform" Decision of April 23, 1991*, 13 MICHIGAN JOURNAL OF INTERNATIONAL LAW 832 (Summer 1992) (discussing the Unity Treaty).

<sup>64</sup> Leila Sfeir Lueschen, *Collective Farms in Transition in the Former German Democratic Republic*, COMPARATIVE ECONOMIC STUDIES, 33 (Summer 1994).

<sup>65</sup> *Id.*

<sup>66</sup> Agrarbericht of the German Federal Government, No. 234 (1996), as cited in Dr. Christian Grimm, Rural Land Law in Germany (May 1998) (unpublished manuscript on file with Rural Development Institute); ULRICH E. KOESTER & KAREN M. BROOKS, AGRICULTURE AND GERMAN REUNIFICATION 8 (World Bank Discussion Paper No. 355, 1997).

Initially, under the Alaska Statehood Act,<sup>67</sup> which set the terms under which Alaska was admitted to statehood in 1959, the state government was authorized to select for itself 104 million acres of land from the public domain outside of the 92 million acres that had already been reserved by the federal government. However, during this selection process the interests of the state government collided with those of the native Alaskans. These conflicts led to the Alaska Native Claims Settlement Act of 1971,<sup>68</sup> under which almost one billion dollars cash and 44 million acres were awarded to Alaska Natives in exchange for relinquishing all of their land claims. Most of this land did not pass to individuals, but to native villages or to special native corporations established under the Act.<sup>69</sup>

The final piece of legislation was the Alaska National Interest Land Conservation Act (ANILCA),<sup>70</sup> which transferred all remaining land to the federal conservation system, and simplified procedures for transferring land to the state and to the native corporations.

Very little of the land affected in the entire process was arable land, but the principles and policies invoked in resolving claims by various levels of government (federal, state, and village or local) are still of possible usefulness.

#### **IV. Checklist of Potential Legal Impediments and Solutions**

This section briefly describes the potential legal impediments related to or created by a lack of land privatization, and identifies potential solutions. The potential solutions are not uniform prescriptions for every country setting, but instead suggest approaches that might be considered in light of the particular setting and ancillary issues.

##### **Potential Impediment: Private land ownership is prohibited.**

Private ownership of land is not allowed, thus making privatization impossible.

##### **Potential Solutions**

- Amend the constitution or relevant law to provide for private ownership as one of the forms of ownership.

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<sup>67</sup> See Cooley, *The Evolution of Alaska Land Policy*, in ALASKA RESOURCES DEVELOPMENT: ISSUES OF THE 1980'S 13 (T. Morehouse ed., 1984). Rudd, *Who Owns Alaska-Mineral Rights Acquisition Amid Rapidly Changing Land Ownership*, 20 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 109 (1975), as cited in Brian Schwarzwald, Alaska Land and Natural Resource Rights (September 6, 1996) (unpublished memorandum on file with Rural Development Institute).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

- If private ownership will not be constitutionally or otherwise allowed, allocate secure, long-term, transferable use rights to private parties.

**Potential Impediment: Privatization laws fail to allocate full ownership rights.**

Land rights that are privatized under the label “ownership” do not encompass the full bundle of rights customarily associated with ownership.

**Potential Solution**

- Laws governing privatization of land into “ownership” should provide for a transfer of secure, long-term land rights, including the rights to control, use and alienate land, to private parties.

**Potential Impediment: Privatization laws only provide for the transfer of land rights that are substantially less than full ownership.**

Government-owned land is transferred to private parties in lifetime inheritable possession, permanent use, or lease, rather than in private ownership.

**Potential Solutions**

- Eliminate “lifetime inheritable possession” and non-alienable “permanent use” as forms of tenure to be prospectively allocated by the state.
- Convert into ownership by operation of law all long-term rights to use land (regardless of the tenure form) held by private individuals that had been allocated by the government. If the individual has already received land free of charge and an additional free grant is objectionable on policy grounds, the land could be transferred free of charge only after being cultivated by the individual for a set period of time. In ECA countries that forbid private ownership of land, such rights could be converted into long term leases (or long term use rights) that are fully alienable upon the sole discretion of the rightholder.
- Government land currently allocated for short-term use could, upon expiration of the short-term rights, be privatized in a process that awards the land to the highest bidder, such as an auction. Alternatively, if the policy decision is made that such land should be transferred to the private party cultivating the land, that party could receive ownership free of charge, for a determined monetary amount or upon fulfillment of certain conditions.

**Potential Impediment: State land funds are large and land is not being rapidly transferred to private owners or users.**

Land in state land funds is usually earmarked for private cultivation, but is not being transferred to private ownership.

#### **Potential Solutions**

- Land already allocated in long- or short-term use rights could be privatized under one of the methods described in the preceding potential solutions checklist.
- Land held in land funds that is not already allocated in long- or short-term use rights could be privatized through a process which awards the land to the highest bidder, such as an auction.

**Potential Impediment: Land used by certain farm enterprises is exempted from privatization.**

Land that is best suited for private control and management languishes in state ownership, while similar land in the same ECA country is privatized.

#### **Potential Solutions**

- The categories of specialized agricultural enterprises exempt from land privatization could be strictly limited to those considered essential to be under public control, and only that land on specialized enterprises actually used for the limited essential public purpose could be retained in state ownership. All other land could be privatized in a timely manner in accordance with the prevailing privatization law.
- Limit the role of local administrations in awarding exemptions to privatization, and subject all exemptions to review at the central government level for conformity with the legal standards established for the exemption.

**Potential Impediment: Incentives provided to regional and local governments to support land privatization are insufficient.**

Regional and local governments have limited sources of revenue and severely constrained budgets, and may be reluctant to support privatization of land if they do not receive some financial benefit.

#### **Potential Solutions**

- Provide by law that all or a great majority of revenues from privatization of land owned or controlled by provincial or local governments should be retained by the

local government or shared between the local and provincial government. Alternatively, provide by law that all or a great majority of revenues from privatization of land, whether owned or controlled by local, regional, or national government, should be retained by the local government or shared between the local and provincial government.

- Institute a land tax system that will, over time, allow local government to collect and retain revenue from the local land base. See **Chapter 10, *Land Taxation***.

**Potential Impediment: Intra-governmental control over land subject to privatization is unclear.**

The ownership of certain lands among different levels of government can be unclear, thus the level of government with the authority to privatize such land is difficult to determine.

#### **Potential Solutions**

- Law and regulations could provide a clear and timely process for determining what level of government owns particular parcels of land, or what level of government has authority to privatize particular parcels of land.
- The federal government could cede any authority it may have over agricultural land to local governments for privatization purposes. This cession of authority could expire at a date certain.

**Potential Impediment: Restitution policies have delayed privatization.**

Physical restitution of land to pre-communist owners has been complex and slow. As a result, the return of land to original owners and the privatization of land (upon which there will be ultimately no successful restitution claims) has been slow.

#### **Potential Solution**

- Some limited solutions are discussed in **Chapter 4, *Land Restitution***.



## Chapter 4

# Land Restitution

by Renée Giovarelli

### I. Introduction

At least a dozen ECA countries in East-Central Europe and the Baltics have passed laws that either returned property or paid compensation to pre-communist owners.<sup>1</sup> In most of these countries, private ownership existed until after World War II.<sup>2</sup> This process of restitution has been one way that nationalized land has been redistributed to private individuals.<sup>3</sup> The approaches taken to restitution have been as varied as the countries that have undertaken such a land reform program, but the approaches do fall into the following three broad categories.

1. Land, buildings, and objects in kind have been returned to former owners or their heirs. Either the exact plot of land or other item of property was returned or a corresponding plot of land in the same area or in the current place of residence was returned (in general, six of the countries chose to physically restore land holdings).<sup>4</sup>
2. Former owners received compensation, usually in the form of capital vouchers.
3. Where ownership of lands was never formally transferred to the state, ownership rights were reinstated if the owner could produce a deed or "witness."

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<sup>1</sup> Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL BUSINESS LAW 315, 315 & n.1 (1993). The eleven countries listed in Gelpern's article are: Albania, Bulgaria, Croatia, the Czech Republic, Estonia, Germany, Hungary, Lithuania, Poland, Romania, and Slovakia. In addition, Latvia also passed restitution laws.

<sup>2</sup> Zvi Lerman, *Changing Land Relations and Farming Structures In Formerly Socialist Countries*, in AGRICULTURAL LANDOWNERSHIP IN TRANSITIONAL ECONOMICS 61 (Gene Wunderlich ed., 1995).

<sup>3</sup> Stephen Wegren, *Introduction: The Third Wave of 20th-Century Land Reform, Post-Soviet States*, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE, xxi (Stephen Wegren ed., 1998) [hereinafter Land Reform].

<sup>4</sup> Gelpern, *supra* note 1, at 315. These countries are the Czech Republic, Slovakia, Estonia, Latvia, Lithuania, and Bulgaria.

The Baltic governments allowed former owners to choose between making a claim for the same plot of land owned prior to land nationalization, making a claim for a corresponding plot of land in the same area or in the current place of residence, or making a claim for compensation.<sup>5</sup> In Albania, only the current land users participated in the distribution of land. Former owners were compensated by a special issue of state bonds.<sup>6</sup> Czechoslovakia returned collectivized land to its original owners, while workers in collectives received land for farming without ownership rights.<sup>7</sup> Bulgaria restored actual land plots to those with evidence of old boundaries. Where no evidence of boundaries was available, land was provided “in quality and quantity” equivalent to the main part of the area where the estate was located.<sup>8</sup> Later, in an effort to speed up a protracted process of land restitution, Bulgaria changed the rules so that entitlement to compensation for those claimants unable to receive their property within physical boundaries was limited to voucher compensation alone, instead of both land and vouchers.<sup>9</sup> Hungary provided financial compensation, instead of physical restitution of land and assets.<sup>10</sup>

Although perhaps morally laudable, restitution has been a difficult legal and administrative process that has often:

- required intensive use of administrative and judicial machinery during a crucial development phase;<sup>11</sup>
- retarded the development of land markets because land subject to restitution cannot be securely held, transferred, or mortgaged until the lengthy restitution process is completed;<sup>12</sup> and
- led to a high degree of absentee ownership on rural land because most of the restituted owners are not farmers and do not live in rural areas.

This chapter focuses on the impact of restitution on land markets and possible legal solutions. It should be noted, however, that restitution is a highly charged political issue, and

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<sup>5</sup> William H. Meyers and Natalija Kazlauskienė, *Land Reform in Estonia, Latvia, and Lithuania: A Comparative Analysis*, in *Land Reform*, *supra* note 3, at 92.

<sup>6</sup> Lerman, *supra* note 2, at 61.

<sup>7</sup> See *id.*

<sup>8</sup> Keith S. Howe, *Politics, Equity, and Efficiency: Objectives and Outcomes in Bulgarian Land Reform*, in *Land Reform*, *supra* note 3, at 214.

<sup>9</sup> See *id.* at 217.

<sup>10</sup> Csaba Csaki and Zvi Lerman, *Land Reform and Farm Restructuring in Hungary During the 1990's*, in *Land Reform*, *supra* note 3, at 229.

<sup>11</sup> The most common restitution bottlenecks are title issuance, title registration, and title dispute resolution.

<sup>12</sup> Meyers and Kazlauskienė discuss this problem for the Baltic countries. Meyers & Kazlauskienė, *supra* note 5, at 92.

many of the legal and political decisions have already been made, for better or for worse. While the land reform and restitution laws have been amended and may continue to be amended in the future, legal recommendations may be of marginal use for a process that is essentially political and is significantly or substantially complete. Moreover, there is little directly related precedent in developed market economies for this type of restitution process from which to draw lessons.<sup>13</sup>

## II. Checklist of Potential Legal Impediments and Solutions

This section briefly describes the potential legal impediments related to or created by land restitution approaches and identifies potential solutions. The potential solutions are not uniform prescriptions for every country setting, but instead are solution approaches that might be considered in light of the particular setting and ancillary issues.

### **Potential Impediment: Parcels claimed in-kind must be issued titles and registered before transactions can occur.**

Under all restitution laws, parcels claimed in-kind must be processed which includes issuing titles and registering those titles to land. In the Baltic States, for example, the deadlines for making claims have passed and many titles have been issued and registered. A large percentage of claims still need to be processed, however. These remaining claims are generally more complicated, involving missing documents or conflicts between claimants. It has been estimated that completion of the titling and registration process will take six to ten more years.<sup>14</sup>

In Bulgaria, many land owners who had lost their original land to urban growth were to be allocated land elsewhere. Unfortunately, there was not enough state land stock to meet all the demands. The Ministry of Agriculture and Food Industry adopted measures that provided for voucher compensation in such cases rather than land and vouchers. This legislation was an effort to speed up the slow process of restitution, titling, and registration.

The slowness of restitution is a significant problem in most countries that provide land in-kind. The overwhelming administrative task of titling and registering land parcels limits the amount of land available for land transactions. In all of the countries surveyed, only land registered in the land book can be sold.<sup>15</sup>

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<sup>13</sup> The fact that Germany has also struggled with the restitution process in the former GDR is instructive as to the degree of difficulty. Germany was, after all, able to bring to the process the highest degree of commitment, resources, and administrative and legal-drafting skills. Nonetheless, the land restitution process has lagged. See the brief discussion of the German experience in Chapter 3, *Land Privatization*.

<sup>14</sup> Meyers & Kazlauskienė, *supra* note 5, at 94-96.

<sup>15</sup> See WORLD BANK, ESTONIA AGRICULTURAL AND FORESTRY POLICY UPDATE 9 (EC4NR Agriculture Policy Note No. 10, February 26, 1997); Meyers & Kazlauskienė, *supra* note 5, at 103-04.

## Potential Solutions

- Revise regulations to allow expedited treatment for potential sellers in return for a fee.
- For those claimants who are unable to receive their property within its original physical boundaries or whose boundaries are disputed, limit compensation to voucher or financial compensation, instead of land in-kind.

### **Potential Impediment: Arable land held by urban dwellers is not being used or transferred.**

In Bulgaria, by 1996 approximately 28% of all cultivable land was untilled and unplanted.<sup>16</sup> One explanation for this disuse is that over half of all owners of restituted cultivable land are urban dwellers. Some of these urban dwellers are willing but not able to transfer their arable land because it has not yet been titled or registered as discussed above, but others want to hold on to land as a hedge against inflation.<sup>17</sup>

In Romania, although there was a legal requirement to maintain use of the land, a 1993 study found that 43% of agricultural land recipients continued to live in urban areas receiving other forms of income.<sup>18</sup> Only 18% cited farming their land as their only occupation.<sup>19</sup> Many of these urban dwellers retain their land plots because their wages have plummeted or their jobs are insecure. For those who want to sell, alienation rights under the land law are tied to possession of legal title and sales must be approved by local commissions—requirements that have severely hampered creation of the land market.<sup>20</sup> However, lease of agricultural land has been allowed in Romania since 1994.<sup>21</sup>

### **Potential Solution**

- Revise law to encourage or provide incentives for long-term leases for restituted owners who cannot or will not sell their land and do not intend to farm it. The law can also

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<sup>16</sup> See Howe, *supra* note 8, at 219.

<sup>17</sup> *Id.*

<sup>18</sup> DAVID C. HENRY, REVIVING ROMANIA'S RURAL ECONOMY 21 (RFE/RL Research Report, February 18, 1994).

<sup>19</sup> *Id.*

<sup>20</sup> Erica Angiewich, *Agrarian Reform and the Land Law in post-Ceausescu Romania* 20 (1994) (unpublished Masters Thesis, University of Washington, on file with the Rural Development Institute).

<sup>21</sup> Mark A. Meyer, *Romania: Analysis and Review of New Leasing Law*, East/West Executive Guide, January 1, 1998, available in LEXIS, World Library, ALLNEWS File. Leasing Law No. 14/1994 deals strictly with the leasing of agricultural property.

provide that land with disputed claims can be leased, identify a priority list for potential lessees, and grant lessees preemptive rights to purchase the land after the disputed claims are resolved.<sup>22</sup>

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<sup>22</sup> The problem of stewardship and investment in land might be reduced if the land is leased to farmers with long-term lease rights with a preemptive right to buy land (that is, to match the price offered by another party if the owner is ready to sell) once the title has been acquired and registered by the owner. Roy Prosterman and Tim Hanstad, *An Analysis of the Czechoslovakian Land Reform Process From A Comparative Perspective* 19 (February 1992) (unpublished manuscript prepared for two roundtables organized in the Czech and Slovak Republics, on file with the Rural Development Institute). For example, Germany provided that land that had potential disputed claims against it could be leased for up to 12 years. Priority in leasing was given to farmers who were victims of the earlier land reform or former independent farmers who wanted to re-establish a private farm. Priority was also given to new farmers who were residents of East Germany as of October 3, 1990. If both parties were equally qualified, priority was given to farmers who wanted to rent the land they were already farming. The second preference went to successors of the former collective farms. Last priority was given to persons who were not local residents by October 3, 1990. Leila Sfeir Lueschen, *Collective Farms in Transition in the Former German Democratic Republic*, 36 COMPARATIVE ECONOMIC STUDIES 33 (1994).

## Chapter 5

# Farm Restructuring

by Leonard Rolfes, Jr.

### I. Introduction

Before the reform process began, the vast majority of agricultural land in ECA countries was cultivated by collective farms, state farms, or other farm structures collective in form and function. Meaningful private ownership and the allocation of land through market mechanisms did not exist. Most ECA countries have attempted, with varying success, to address these land issues through the process of restructuring the above-mentioned agricultural enterprises.

This chapter reviews ECA-country law and policy for impediments to the following land-related goals of farm restructuring:

1. Allocation of rights of ownership, use, and transfer of land cultivated by large agricultural enterprises<sup>1</sup> to private individuals;
2. Prevention of the return of long-term or permanent legal control of land to large agricultural enterprises; and
3. Physical break-up (decollectivization) of land farmed by large agricultural enterprises for cultivation by much smaller farms.

This chapter also reviews applicable experience from developed market economies, though they have limited experience with the land issues that arise in the farm restructuring context. Finally, this chapter addresses impediments to farm restructuring that relate to land restitution issues only to a limited extent; fuller consideration of these issues is contained in **Chapter 3, *Land Privatization***, and **Chapter 4, *Land Restitution***.

### II. Impediments Identified in ECA Countries

#### A. Formalization of Ownership Rights to Land on Restructuring Farms

The first step toward meeting the goals listed above is the transfer of ownership of land used by large agricultural enterprises to the designated groups of beneficiaries (farm workers,

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<sup>1</sup> The term "large agricultural enterprise" is used in this chapter to denote: (a) collective farms, state farms, and other types of collective structures; and (b) the new large-scale agricultural enterprises that emerged from the collective structures. These new enterprises remain collective by all meaningful measures, even though they may be privately owned by stockholders, members, or in some other manner.

pensioners, former landowners, etc.), along with the formalization of such ownership. In Russia, for example, farm workers, pensioners and (usually) social sphere workers all received ownership of equal "land shares."<sup>2</sup> Legal enactments provide that ownership certificates are to be issued to owners of land shares, and that these certificates are to be registered.<sup>3</sup> This has in fact occurred for the vast majority of land shares. However, in some ECA countries important shortcomings in achieving basic transfer of ownership have appeared.

First, in some ECA countries the law does not provide for large-scale transfer of agricultural land to private ownership. In Uzbekistan, for example, rights of "permanent possession" to most agricultural land have been allocated to the large agricultural enterprises that traditionally farmed the land, rather than allocating ownership to the enterprise workers or pensioners.<sup>4</sup> No land share system has been legislated.

A similar situation exists in Belarus. Under Belorussian law most agricultural land is allocated to cooperatives, companies, and other large agricultural enterprises in permanent use.<sup>5</sup> The land is not allocated to enterprise workers or other rural dwellers in any form resembling a land share system, and only a small fraction has been allocated to citizens for use on private farms.

Second, for ECA countries which have adopted the policy of returning land to pre-collectivization owners or their heirs, the previous owners or successors in interest must have their respective rights reviewed and confirmed. However, the methods established by law for processing and registering rights resulted in significant delays in documenting and registering rights in some countries, such as the Baltic States.<sup>6</sup>

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<sup>2</sup> See Decree of the President of the Russian Federation No. 323 "On Urgent Measures for Implementation of Land Reform in the R.S.F.S.R." (December 27, 1991) [hereinafter RF Decree No. 323]; Resolution of the Government of the Russian Federation No. 86 "On the Procedure for Reorganization of Collective and State Farms (December 29, 1991); and Resolution of the Government of the Russian Federation No. 708 "On the Procedure for Privatization and Reorganization of Enterprises and Organizations of the Agro-Industrial Complex" (September 4, 1992).

<sup>3</sup> Decree of the President of the Russian Federation No. 1767 "On the Regulation of Land Relations and the Development of Agrarian Reform in Russia," secs. 5, 9 (October 27, 1993) [hereinafter RF Decree No. 1767].

<sup>4</sup> Law of the Republic of Uzbekistan "On Land," art. 10 (1990, *as amended*). See also Zvi Lerman, *Land Reform in Uzbekistan, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE* 150-55 (Stephen K. Wegren, ed., 1998) [hereinafter Land Reform].

<sup>5</sup> Land Code of the Republic of Belarus article 7.

<sup>6</sup> William H. Meyers & Natalija Kazlauskienė, *Land Reform in Estonia, Latvia, and Lithuania*, in Land Reform, *supra* note 4, at 93; THE WORLD BANK, *ESTONIA AGRICULTURAL AND FORESTRY POLICY UPDATE* 7-9 (EC4NR Agriculture Policy Note #10, February 26, 1997). See Chapter 4, *Land Restitution*, for a more complete discussion. For a discussion of issues related to land registration in ECA countries, see Chapter 9, *Land Registration*.

## B. Land Share Transaction Rights

The issue of land share transactions is fundamental to farm restructuring in ECA countries. The movement of land shares to small private farms and other new agricultural production units will be a gradual process, occurring as individual owners and small groups of owners seek economic opportunity, and as retired workers, who typically own a large percentage of land shares, pass on.<sup>7</sup>

For farm restructuring to be successful, the law must provide that land shares can be bought, sold, leased, transferred by gift, bequeathed, mortgaged, and otherwise conveyed. In other words, land shares should be as fully tradable as land itself.

In some ECA countries the full range of land share transactions is not sanctioned by law. In Ukraine, for example, land share transactions are only allowed within the context of the original farm enterprise itself; shares may not be sold, leased or otherwise alienated to outsiders.<sup>8</sup> This restriction drastically limits the marketability of the shares. The draft Russian Land Code of 1997 only allows land shares to be leased to or contributed to the charter capital of large agricultural enterprises; general lease, sale and other types of transactions are not authorized.<sup>9</sup>

Another problem that has surfaced in draft laws is that recipients of land shares must exercise their transaction rights within a limited period of time (such as through a formal lease to the collective) or else their shares will be re-nationalized and lost. Ostensibly the purpose of this provision is to ensure use of land, but it will not achieve that goal and is otherwise a threat to private land rights. Land will be used if it makes economic sense; the law cannot force meaningful land use by fiat. Thus, in the economically-troubled agricultural sectors of most ECA countries, new land share owners may not be able to lease or otherwise carry out a transaction with their shares. They should not lose their rights as a result. In addition, if leaders of the large agricultural enterprises (who are typically hostile to land share rights) knew that land share owners had to, for example, lease their rights or lose them, the leaders would simply refuse to lease the land shares even if offered. Russia has resolved this issue favorably, by providing that use of any land share on which no affirmative disposition has been made will be deemed to be transferred to the collective for successive three year periods, with the owner retaining full rights to make some other disposition at the end of any of those three year periods.<sup>10</sup>

<sup>7</sup> As an example, Rural Development Institute field research in Russia suggests that roughly 40% of land shares are owned by pensioners; as they die, their shares will pass on to their sons and daughters.

<sup>8</sup> Timothy N. Ash, *Agricultural and Land Reform in Ukraine*, in Land Reform, *supra* note 4, at 70.

<sup>9</sup> Draft Land Code of the Russian Federation art. 99 (1997). This abominable provision is in marked contrast to existing legislation in Russia. See RF Decree No. 1767, *supra* note 3, sec. 5 (clearly sanctioning the full range of transactions in land shares).

<sup>10</sup> Decree of the President of the Russian Federation No. 337 "On Realization of Citizens' Constitutional Rights to Land," sec. 9 (March 7, 1996) [hereinafter RF Decree No. 337].



### C. Process of Withdrawing Land Shares In Kind from Large Agricultural Enterprises

A crucial component of farm reorganization and the land share system is the ability of land share owners to convert their land shares into land in kind to start a private farm, or to carry out a land transaction. Impediments related to land share withdrawal fall under two broad categories: (a) whether co-owners have an effective veto power over whether or not an individual land share owner can withdraw land at all; and (b) whether the withdrawing land share owner has a reasonable chance of receiving land of average quality and location.

Regarding the first category, two specific legal impediments have been identified. First, Russian legislation for a brief period required that the location of the land plot to be withdrawn be unanimously approved by the co-owners of the land or their representatives.<sup>11</sup> Since the co-owners of the land often number into the hundreds, unanimity was practically impossible.

Second, it is likely that in some ECA countries the act of withdrawal itself from the collective by the landowner has to be approved by a vote of the general meeting of members.

Regarding the second category, four types of legal impediments have been identified. First, in Russia land shares to be allocated in kind may have to come from a pre-determined *massif* identified by the enterprise leadership, which may be remote or poor-quality land (and in any event is inflexible, if the land share owner lives in village A of the collective, but the *massif* is located near village C of the collective).<sup>12</sup> Second, also in Russia, the method currently used for withdrawing land in kind relies on agreement between the parties and, in the event of lack of agreement, a decision on location is made by the local authorities.<sup>13</sup> While this method often works satisfactorily, and is the best method so far to be generally applied, its efficacy depends on the inclination of local authorities to allocate quality land in a satisfactory location. Third, legislation may not adequately specify that the land share owner applying to withdraw his share in kind is entitled to average-quality land or to land located, if reasonably possible, near his home village. Fourth, the law may not be sufficiently clear that several families leaving the collective together are entitled to receive contiguous parcels for their land shares, and hostile enterprise managers may seek to allocate the parcels in a scattered manner.

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<sup>11</sup> Government of the Russian Federation "Recommendations on Procedure for Disposal of Land and Property Shares," secs. 28-30, *approved by* Resolution of the Government of the Russian Federation No. 96 "On the Procedure for Exercising the Rights of Owners of Land and Property Shares" (February 1, 1995). Absent such unanimity, the withdrawing owner would have had to go to court, an expensive and time-consuming prospect. The unanimity requirement was effectively voided by RF Decree No. 337, *supra* note 10, at secs. 4, 10.

<sup>12</sup> RF Decree No. 323, *supra* note 2, sec. 7.

<sup>13</sup> RF Decree No. 337, *supra* note 10, sec. 10.

One interesting solution has been enacted to address these issues. In Russia's Vladimir Oblast, government officials have adopted a procedure intended to predictably and reliably lead to the allocation of contiguous parcels of approximately average quality and location. The procedure is based on simple game-theory notions, consisting of a process of negotiated selection between the withdrawing land share owner and a representative of the remaining co-owners of the land.<sup>14</sup>

#### **D. Contribution of Land Shares to Enterprise Charter Capital Funds**

The law in several ECA countries, such as Russia<sup>15</sup> and the Kyrgyz Republic,<sup>16</sup> allows land share owners to contribute their land shares to the charter capital of agricultural enterprises in exchange for a participatory stake in the ownership of that enterprise.

From a purely free market perspective, the right of a land share owner to transfer ownership of his land shares to the charter capital fund of an agricultural enterprise, in exchange for an equity interest in that enterprise, may be seen as a valid type of transfer<sup>17</sup>, just like a sale, or lease. However, such contributions result in cosmetically-reorganized collective farms gaining ownership of land, thus halting the process of decollectivization needed for ECA agriculture to become more productive. Importantly, once a land share owner has contributed ownership of his shares, he no longer has the legal right to withdraw those shares to start a private farm or to lease them to a more productive farm nearby.

In addition, most land share owners are not economically well-off in the struggling ECA countries. Their most valuable potential assets are probably their land shares, which should generate more and more income for their owners as land markets develop. However, in exchange for contributing these potentially valuable assets, land share owners typically receive a stake in an agricultural enterprise that is heavily burdened by debt and offers almost no chance of distributing dividends or other profits to its stakeholders.

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<sup>14</sup> See Vladimir Oblast Committee on Land Resources and Land Management Resolution No. 2, "Recommendations on Determining the Location of Land Plots to be Withdrawn in Exchange for Land Shares" (July 31, 1997). Under this procedure, the land share owner wishing to withdraw land and the representatives of the remaining co-owners of the land take alternating turns proposing a field on which the withdrawing owner's land share(s) will be demarcated in kind. If one side rejects the other side's proposal of a particular field, that field is removed from the negotiation. The process continues until one side accepts the other side's proposal, or until only one field is left. At that point, the plot(s) are demarcated in a contiguous area on the edge of that field by land engineering specialists from the *rayon* land committee.

<sup>15</sup> RF Decree No. 337, *supra* note 10, sec. 4.

<sup>16</sup> CIVIL CODE OF THE KYRGYZ REPUBLIC art. 105.

<sup>17</sup> A contribution to capital may, conceptually, most aptly be regarded as a particular type of sale of the land right, in which the payment received in return is an equity interest in the company or other legal entity to which the contribution has been made.

A variety of possible legal measures may help discourage early or improvident contributions of land shares to enterprise capital, such as:

- Institute a complete ban on contributions, or a multi-year moratorium on contributions;
- Require that contributions be formalized only through a bilateral written contract between the contributor and the enterprise, rather than permitting multiple contributors to “line up” (say, at the end of a general meeting of the enterprise) and sign a single, multi-lateral contribution document;
- Require that contribution contracts contain a warning legend,<sup>18</sup> telling the prospective contributor that his land share right may be very valuable, and that by signing the contract he will lose it permanently and cannot pass it on to his heirs;
- Require that contribution contracts be notarized,<sup>19</sup> or
- Legally permit withdrawing member of certain lands of enterprises, especially of cooperatives, to withdraw equivalent land in kind even after making a contribution to capital.<sup>20</sup>

#### **E. Long Term Lease of Land Shares to Agricultural Enterprises**

The long-term lease of land shares to large agricultural enterprises effectively creates a barrier to the needed decollectivization of those enterprises, while making the land shares unavailable for private farming. These leases raise issues similar to those raised by contributions to capital. They preserve inefficient large enterprises, typically grow out of grossly unequal bargaining power (although nominally they may be freely negotiated), are likely to involve very low rent payments to the lessor, and preclude land share owners from using their shares in more profitable ways in the future as the land market develops and land values manifest themselves. Long term leases of land shares are sanctioned by law in several ECA countries, such as Russia.<sup>21</sup>

#### **F. Demarcation of Land Shares on the Ground**

One potential impediment to farm restructuring in ECA countries is that, under the general structure of the land share system, land shares represent ownership of a specific amount of land, but the physical location of that land is not identified. Instead, the land share is the right to a specific amount of land located somewhere on the territory of the former collective or state farm. The land’s location is usually only determined on the ground when the land share owner

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<sup>18</sup> In discussions with the Rural Development Institute, one senior Russian official approvingly likened this to a “cigarette warning label.”

<sup>19</sup> However, it will be difficult to require notarization of such contracts without also requiring notarization of ordinary contracts of sale of land plots and land shares. Notarization may entail high financial outlays.

<sup>20</sup> Law of the Russian Federation “On Agricultural Cooperation,” art. 10 (1994).

<sup>21</sup> RF Decree No. 337, *supra* note 10, sec. 4.

decides to convert his share into a plot of land in kind for withdrawal, either for personal use or for sale or lease to a third party.

Because the land share is not demarcated on the ground at the start, the owner has no true feeling of ownership, and thus is less likely to consider starting a private farm or conducting a transaction with his share. On the other hand, if shares are not demarcated in kind, when a land share owner does decide to acquire additional shares to start a private farm, he does not have to have the good luck of having his land located adjacent to other owners willing to deal in order to have contiguous parcels, but can negotiate with any of the common owners.<sup>22</sup> A possible compromise approach might have land share owners receive demarcated land parcels near family members or close friends, or have them receive land share certificates giving them the right to receive land near their village, as opposed to anywhere on the former collective or state farm.

Perhaps the most significant ECA experiment in demarcating and titling each individual land share, even while its owner continues to work in a large enterprise, has been going on in Moldova. There, 69 of the approximately 1,000 former collectives have gone through such a process of demarcating each individual's land share on a map, issuing ownership certificates for that demarcated share, and registering the share. Under this experiment, the land plot is demarcated on the ground only when the owner is prepared to cultivate it personally or to sell or lease it to a third party. An additional 492 former collectives have signed agreements with the Moldovan Ministry of Economy and Reforms to prepare their members' shares in such a manner.<sup>23</sup>

### **G. Agricultural Enterprises Exempt From Restructuring**

A major impediment to land market development is the legal exemption given to many collective agricultural enterprises from the privatization and restructuring processes. As a result, the land of these enterprises is excluded from allocation among the workers and associated personnel of these enterprises. This impediment is explored in **Chapter 3, *Land Privatization***.

### **H. Reduction of Farm Size**

Along with the transfer of agricultural land rights to private citizens, the fundamental reform that must be addressed by farm restructuring policy in the land sphere is the decollectivization (physical breakup into much smaller farms) of the large agricultural enterprises

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<sup>22</sup> There are other cases as well where flexibility in location is likely to be important. These include sale or lease of the land share to an existing private farmer who would like the parcel demarcated close to his present land, and departure from the large enterprise of several households together, who would like adjoining land.

<sup>23</sup> Telephone interview with Robert Mitchell, Rural Development Institute staff attorney and project attorney for USAID Project to Develop Land Markets, Chisinau, Moldova (July 9, 1998).

which, by virtue of their size, are generally incapable of becoming productive, profitable economic entities.<sup>24</sup>

The land legislation of some ECA countries, notably Belarus and Uzbekistan, avowedly favors retention of large-scale agriculture, while the remaining ECA countries, in general, place decision making as to farm size up to the agricultural landowners. No ECA country has legal rules which directly attempt to reduce the size of the large agricultural enterprises.

From a free market perspective, adopting laws to force farm breakup is contrary to allowing the landowners the choice to decide how to farm. On the other hand, these landowners -- whose land is being used largely by former collective and state farms -- generally have little practical power regarding how their land is used.

The beginning of the reform process saw many ECA countries "restructure" their collective and state farm sectors, resulting in former collectivized farms that were largely restructured only in name. This applied especially to the land component of restructuring. Since that time there have been legal attempts to encourage further restructuring, notably in Russia,<sup>25</sup> but these efforts have not resulted in significant decollectivization of the land.

One potential legal measure to induce farm breakup would be for ECA countries to codify in law the maximum number of hectares of arable land that a single individual or enterprise could cultivate. The maximum could be set high enough to allow significant freedom to determine farm size, yet still well below the traditional sizes of collective and state farms. To

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<sup>24</sup> See also Roy Prosterman, Why it is Important Both to the Peasant Farmers and to Russia that Agricultural Land be Privately Owned in the Normal Way, With the Right to Buy, Sell, Lease and Mortgage (Mar. 1998) (text of speech given at the 9th annual conference of the Association of Peasant Farmers and Cooperatives of Russia) (on file with the Rural Development Institute) (comparing Russian grain productivity per hectare with Western Europe); JOHAN VAN ZYL ET AL., AGRARIAN STRUCTURE IN POLAND: THE MYTH OF LARGE FARM SUPERIORITY (World Bank Policy Research Working Paper 1596, April 1996); LUNG-FAI WONG, AGRICULTURAL PRODUCTIVITY IN THE SOCIALIST COUNTRIES (1986) (showing negative growth rates in total factor productivity in eight ECA countries plus China); HANS BINSWANGER ET AL., POWER, DISTORTIONS, REVOLT AND REFORM IN AGRICULTURAL LAND RELATIONS (World Bank Working Paper WPS 1194, July 1993); Nancy L. Johnson & Vernon Ruttan, *Why Are Farms So Small?* 22 WORLD DEVELOPMENT 691 (1994); and W. PETERSON & Y. KISLEV, ECONOMIES OF SCALE IN AGRICULTURE: A RE-EXAMINATION OF THE EVIDENCE (Department of Agricultural and Applied Economics, University of Minnesota, St. Paul, Staff Paper P91-43) (discussing the general consensus that economies of scale do not exist in agriculture, except under very special circumstances).

<sup>25</sup> See Resolution of the Government of the Russian Federation No. 324 "On the Experience of Agrarian Reform in Nizhny Novgorod Province" (April 15, 1994); Resolution of the Government of the Russian Federation No. 874 "On Reorganization of Agricultural Enterprises Based on the Experience of the Nizhny Novgorod Province" (July 27, 1994); and Resolution of the Government of the Russian Federation No. 96 "On Procedure for Exercising the Rights of Owners of Land and Property Shares" (February 1, 1995). On balance, these resolutions set out clear rules for determining rights to land as well as enumerating an auction process for allocating this land into new enterprises, but do not include provisions to force break-up. Their use (while having other benefits) has not resulted in significant farm break-up. See generally IFC, LAND REFORM IN RUSSIA: LAND PRIVATIZATION AND FARM REORGANIZATION PROJECT OPERATIONAL REPORT (1997).

be effective, such maximums would probably have to apply not just to land owned by the person or legal entity, but to all land held, whatever the tenure form.

Another possible legal measure to encourage break-up might involve rescheduling or forgiveness (in part or in whole) of debt owed to the government by large agricultural enterprises which are insolvent or on the verge of bankruptcy, if they were as a *quid pro quo* to break up into much smaller farming units. A persuasive rationale from the government's standpoint might be that such rescheduling or forgiveness -- unlike the many that had often gone before for the collectives -- would be far more likely to give rise to agricultural units that would not become mired in debt again.

### III. Comparative Experience on Farm Restructuring in Developed Market Economies

With the exception of Germany, the allocation of private rights to collectively controlled land and the breakup of large collective enterprises are not issues with which developed market economies have had significant experience. The methods chosen by ECA countries to address these issues are generally unique to the region, and reflect the circumstances of particular countries. Market economy experience is therefore of limited application to the impediments to farm restructuring identified in the preceding section of this chapter.

#### A. Farm Restructuring and the German Experience

As with most ECA countries, agricultural land in the eastern part of Germany was primarily cultivated by collective farms during the communist era. However, with regard to farm restructuring, the German experience can offer only limited guidance for three principal reasons. First, privatization took place primarily through the restitution mechanism, a model used in many ECA countries, but whose parameters are already largely determined. Second, roughly three quarters of the agricultural work force quickly lost their jobs during restructuring,<sup>26</sup> a result that would not be tolerable in any of the ECA countries, which lack the resources Germany had to provide a social safety net. Third, from the start Germany possessed developed institutions (administrative, banking, etc.) to support the process, while the ECA countries are still developing such support mechanisms.

In Germany, privatization of land cultivated by the former state and collective farms was extensive, and was accomplished in accordance with the legislation on restitution, though the process is not fully complete and difficulties remain. As of 1995 about 85% of the agricultural land in the former German Democratic Republic (GDR) was privately owned.<sup>27</sup>

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<sup>26</sup> ULRICH E. KOESTER & KAREN M. BROOKS, AGRICULTURE AND GERMAN REUNIFICATION I (World Bank Discussion Paper No. 355, 1997).

<sup>27</sup> *Id.* at 20.

Regarding private rights to conduct land transactions, the territory of the former GDR was brought under the laws of the Federal Republic of Germany as a part of the reunification process. As discussed in **Chapter 7, Land Transactions**, German law gives private landowners broad rights to decide for themselves whether and how to lease, sell, and conduct other transactions with their land. Leasing is a prevalent phenomenon in eastern Germany: 90% of arable land is leased out to cultivators.<sup>28</sup> Sale of land has been less prevalent, but is occurring.<sup>29</sup>

Finally, German law contains no specific provisions regarding the breakup of land cultivated by former state and collective farms. Farm restructuring legislation focuses on formation of new legal entities and allocation of non-land assets, leaving the decision as to land allocation to the landowners. Roughly 63% of the arable land is cultivated by the successors to the collective farms, although these successor farms cultivate on average about half the amount of land that the original collectives did.<sup>30</sup>

#### **IV. Checklist of Potential Legal Impediments and Solutions**

Paradoxically, farm reorganization is an area where the careful application of legal restrictions may actually help the land market to develop over the medium term.

**Potential Impediment: Land on restructuring collective and state farms is not being transferred to the ownership of individuals.**

Land use rights in some ECA countries are allocated to the restructured collective and state farms, not to individuals, private farms, or other decollectivized production units.

##### **Potential Solution**

- Allocate land share rights to workers, pensioners, and social-sphere workers associated with former collective and state farms.

**Potential Impediment: Land share transaction rights do not encompass the complete range of possible transactions in land.**

The inability to engage in a full range of transactions, whether due to a general limitation on land right transactions or a targeted limitation on land shares, imposes a major restraint on farm restructuring.

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<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 31.

<sup>30</sup> *Id.* at 13, 20. 1997 UNITED STATES DEPARTMENT OF AGRICULTURE, ANNUAL REPORT ON GERMAN COMMODITIES AND AGRICULTURE (USDA Report, September 29, 1997).

### **Potential Solutions**

- Adopt legislation giving all owners of agricultural land and land shares the legal right to buy, sell, lease, mortgage, gift, and bequeath their land rights.
- Land legislation should apply fully to land shares as well as land plots, except when special provisions unique to land shares are needed.
- Land shares should be transferable to all citizens, not just to those currently working on the enterprise where the share is located. If enterprise workers are given a preference in acquiring shares, this advantage should be limited to a right of first refusal to meet outside offers, and clear legal substantive and procedural rules should be developed for exercising the right of first refusal.
- The law should prevent the loss of land share rights when a decision on disposition of a land share has not been formally made. The present user (the collective) should continue to use the land until the holder chooses to make a disposition or claim the land in kind.

**Potential Impediment: The rules for allocation of land shares in kind do not ensure that withdrawing land shareholders receive land of average quality and location.**

This impediment impacts not only on the holder's ability to start a private farm, but also to sell, lease, or mortgage the land share.

### **Potential Solutions**

- Provide in law that land should be available for withdrawal from the entire area of land indicated on the land share certificate, not limited to a minor portion of that land.
- Provide in law that withdrawability of a land share is a land transaction right which may be exercised at the discretion of the land share owner.
- Develop a simple legal procedure using objective rules that gives a withdrawing land share owner or his transferee a reasonable chance of receiving land of average quality and location.

**Potential Impediment: Contributions of land shares to enterprise charter capital funds are irrevocable.**

Such contributions risk consolidating ownership rights in collective farms, and eliminate land share owners' rights to make subsequent decisions to start private farms or conduct share transactions.



### **Potential Solutions**

- Prohibit irrevocable capital contributions of land, while allowing leases or short-term contributions of use rights
- Allow irrevocable capital contributions of land, but with safeguards. These safeguards could include requiring bilateral contracts for contributions, forbidding the use of multi-lateral contracts for contributions, attaching a warning on the standard contribution contract, and a requirement that the contract be notarized.
- Allow land share owners who contribute their land shares to an agricultural enterprise to terminate the contribution at any time, or (conceptually different but in practice the same) to leave the enterprise with equivalent land at any time.
- Limit the contribution of land shares or temporary use rights thereof to an agricultural enterprise to a maximum period of three years.

**Potential Impediment: Long term lease of land shares to large agricultural enterprises may lock up land in inefficient production units.**

As with contributions to capital, these stifle the farm breakup process, and lock land up for long-term use by inefficient production units.

### **Potential Solution**

- The term of land share leases could be limited, perhaps to three years, until land share owners have a more equal bargaining position in relation to the enterprises.

**Potential Impediment: Lack of demarcation of land shares on the ground hinders withdrawal of land rights for private farming.**

The absence of demarcation may contribute to the fact that relatively few land shares have been withdrawn from large agricultural enterprises.

### **Potential Solutions**

- If some form of demarcation is desired, an intermediate step could be to enact legislation issuing a land share certificate with the corresponding individual land parcel indicated on a map. On the ground demarcation would occur when a land share owner wants to withdraw his land share in kind.
- Issue certificates identifying the land share right in the vicinity of the owner's village, rather than somewhere on the territory of the entire former collective farm.

**Potential Impediment: Legislation to directly reduce farm size is lacking.**

In a majority of ECA countries, most arable land is still held in large enterprises that are direct descendants of the collective and state farms, and have been merely cosmetically reorganized. Voluntary efforts at whole-farm restructuring have had limited results in terms of reduction in size.

**Potential Solutions**

- Eliminate legislative provisions favoring retention of large agricultural enterprises.
- Establish maximum sizes for landholdings of a single farming operation. Maxima for private farms and large enterprises could be set using parallel criteria. These maximums should be high enough to provide substantial flexibility for private actors to determine farm size, yet still substantially below the size of former collective and state farms.
- Government could restructure or write off debts of insolvent large enterprises in return for breakup of these enterprises into smaller units.

## Chapter 6

# Land Use Regulation

By Renée Giovarelli

### I. Introduction

Land use controls require balancing of public purpose or needs with efficiency and private cost. Land use restrictions may accomplish their intended purpose, but in doing so may impose unnecessarily high costs on individuals and the community.<sup>1</sup> Land use restrictions or requirements that impose too heavy a burden on private parties can cause insecure land tenure, especially when the penalty for violation is losing the right to the land, and even more notably when that land right is to be taken from the owner without compensation. Countries emerging from central planning often emphasize public purpose but ignore efficiency and private cost.

Land use requirements such as development permits, setback requirements, open space, or development prohibitions for environmental purposes can become obstacles to land market development and to efficient land use if the requirements are overly broad or restrictive. The difficulty with such legislation is judging what is "overly restrictive," which necessarily requires a balancing of (often competing) social, economic, and environmental goals. Moreover, the implementing institutions can be problematic even if the rules themselves are not. For example, a development permit requirement may seem reasonable on its face, but if the agency that grants the permit is understaffed, staffed by old communist apparatchiks hostile to private land rights, or otherwise incapable of handling requests in a low-cost and timely manner, the result can be inefficient use of land, efficient use of land that lacks legal sanction, and/or an underdeveloped land market.

The state does have a legitimate role to play in assuring that land is used well and that use of land does not interfere with the rights of other persons or legal entities. Generally, states control land use through zoning and environmental regulations. Land use that does not interfere with the rights of others is generally not (or ought not be) controlled by the state.

Section II of this chapter examines legal land use issues in ECA countries, section III reviews how developed market economies handle similar land use issues, section IV provides a checklist of potential land use issues that may become impediments to developing a functioning land market, together with solutions that might be considered for each issue, and section V

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<sup>1</sup>Jack L. Knetsch, *Land Use: Values, Controls and Compensation*, in *LAW AND ECONOMIC DEVELOPMENT: CASES AND MATERIALS FROM SOUTHEAST ASIA* 289 (Euston Quah & William A.W. Neilson eds., 1993).

provides a list of points to consider when developing a land use planning law for an ECA country.

## II. Land Use Issues in ECA Countries

### A. Rational Use

The requirement that land be used “rationally” is one example of a land use requirement that is worded too broadly in terms of the obligation it imposes. The result of such a vaguely worded requirement may be arbitrary enforcement by local or other officials, added reluctance by individuals to risk acquiring private land rights in anticipation of possible arbitrary enforcement, and (depending in part on the severity of the penalties) greater reluctance of banks to get involved in financing private purchase of land rights. A lack of definition in law results in a lack of transparency and predictability.

Article 285 of the Russian Civil Code provides that land can be withdrawn from its owner if there is a flagrant violation of rational land use rules, in particular if the parcel is not used in accordance with its designated purpose “or if its use leads to a material reduction of the fertility of agricultural land or to a significant worsening of the ecological situation.”<sup>2</sup> These provisions are vague and at the same time subject land owners to serious sanctions.

In at least one *oblast* in Russia, the local land committees visit every farm to inspect whether land is being used and whether it is being used “rationally.” These local officials have the power to fine landholders and to confiscate land for irrational use. The officials in this *oblast* confiscated approximately 4,000 hectares of arable land in 1996 for reasons of “irrational use.”<sup>3</sup>

Article 3 of Kazakhstan’s Civil Code states that land relations cannot result in damage to the land, or to the rights or interests of third parties. Article 116 tries to ensure “rational use” of land. The land codes in Uzbekistan and Moldova also require the “rational use” of land, and contain severe penalties for non-compliance.<sup>4</sup>

Hungary’s 1994 Land Law contains a wide range of regulations aimed at ensuring environmentally sound utilization of land, and provides significant discretion to local land department offices to determine whether utilization is appropriate, and whether changes in cultivation schemes are acceptable. Observers have noted that while the logic of environmental concerns is sound, they should be addressed through less discretionary procedures to prevent

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<sup>2</sup> CIVIL CODE OF THE RUSSIAN FEDERATION art. 285.

<sup>3</sup> These officials interpreted legal “rational use” language to include non-use of land. See BRADLEY ROREM & RENEE GIOVARELLI, AGRARIAN REFORM IN THE RUSSIAN FAR EAST 28-29 (Rural Development Institute Reports on Foreign Aid and Development No. 95, October 1997).

<sup>4</sup> LAND CODE OF MOLDOVA arts. 23, 24; Law of the Republic of Uzbekistan “On Land,” art. 18 (June 20, 1990).

inconsistencies and bureaucratic abuse from deterring investments and hampering consolidation.<sup>5</sup> With such a heavy reliance on the discretion of local officials, the legislation is less likely to achieve its desired effect and more likely to create insecure land tenure.

## **B. Soil Quality**

Legal requirements that owners raise the quality or productivity of the soil are typically too broad and too restrictive. Such provisions are typically too broad because they provide no standards or definitions and too restrictive because owners need not be forced to take actions that are likely to be within their own interest. The cost of soil degradation is absorbed by the farmer with few external costs. State interference in soil quality is generally unnecessary.

Russian land enactments provide that fines can be imposed for, among other things, non-execution of obligatory measures aimed at improving land and protecting the soil.<sup>6</sup>

In the Kazakh Civil Code, Articles 34 and 110 require owners to "raise the productivity of the soil." Despite the lack of specific definition, landowners are subject to severe consequences if they are found to violate these broadly stated requirements. Article 71 of the Civil Code allows for termination of property rights for "the systematic breaching by the land owner or user of his obligations" and article 125 provides for administrative and even criminal sanctions.<sup>7</sup>

The Land Code in Moldova gives the state the power to confiscate land based upon non-use or a reduction in soil quality, which includes using the land in ways that violate local plans for erosion control.<sup>8</sup>

## **C. Non-Use of Land**

Legal rules mandating that farmland be used and threatening confiscation for non-use exist in several ECA countries. Such rules reflect a lingering distrust of market forces, and a lingering belief that bureaucrats can exercise better judgment over the use of land than private right-holders. Psychologically and politically, it is not a big step from this point to bureaucratic directives on whether the land should be used for growing wheat, cotton, or sugarbeets. While it may be agronomically or economically sensible for a farmer to leave a portion of his land

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<sup>5</sup> Csaba Csaki & Zvi Lerman, *Land Reform and Farm Restructuring in Hungary During the 1990's*, in *LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE* 235 (Stephen Wegren ed., 1998) [hereinafter *Land Reform*].

<sup>6</sup> Decree of the President of the Russian Federation No. 2162, "On Greater State Control over the Use and Protection of Lands During the Agrarian Reform" (December 16, 1993).

<sup>7</sup> Steven Hendrix, *Legislative Reform of Property Ownership in Kazakhstan*, 15 *DEVELOPMENT POLICY REVIEW* 159, 162 (June 1996).

<sup>8</sup> *LAND CODE OF THE REPUBLIC OF MOLDOVA* arts. 23, 24.

temporarily fallow or idle, the threats of fines and confiscation can impede private parties from making such a decision. The greatest danger with regard to efficient land use and protection of land is not the actions of private owners, but the actions of or threat of actions by the state or local authorities that undermine confidence in private land rights.

In countries that have little arable land, there is a fear that non-use of land will lead to food shortages. The concern in the Kyrgyz Republic, for example, is that even if it is in an individual's interest not to cultivate the land, it may not be in the interest of the country and future generations. To balance this concern with the issues addressed above, local officials who are sympathetic to individual rights are instituting forced leasing of unused land. Local officials who believe in state control, however, are confiscating land. Broad rules regarding land use allow both of these two disparate actions to be legal.

Moldova, Uzbekistan, Kazakhstan, and Ukraine among other countries, all give the state the power to confiscate land based upon non-use. The 1991 Land Code in Russia (article 39) allowed land to be withdrawn for non-use. This land could be added to a land fund for subsequent distribution to particular entities or individuals who were interested in farming. In 1993, President Yeltsin repealed this provision along with land withdrawal provisions that had been designed to develop land funds.<sup>9</sup>

Nonetheless, in Russia as in other FSU countries, land continues to be taken from private landholders for non-use. In one *oblast* where over half of the land was not being cultivated due to the economic situation, much of it held by the state, land inspectors continue to take land from private landholders for non-use.<sup>10</sup>

In Ukraine, private landowners are required to cultivate their land continuously, without a break of more than one year. If these conditions are not met, the private land can be taken away by administrative action of local authorities.<sup>11</sup>

The agencies withdrawing land are the land committees, the same agencies collecting statistics on land transactions, surveying and drawing maps, and registering land. This can be problematic. In Russia, local land agencies often consider land inspections and withdrawals to

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<sup>9</sup> CIVIL CODE OF THE RUSSIAN FEDERATION art. 284 provides that a land plot may be withdrawn from the owner when the plot is earmarked for agricultural production or for housing or other construction and is not used for those purposes within three years, unless a longer period has been established by law. Article 284 also provides general language allowing for exceptions to this rule. However, article 284 (located within chapter 17 of the Civil Code) is not in effect at this time because chapter 17 of the Code is to be introduced into operation on the date of the introduction into operation of the Land Code of the Russian Federation, and a Land Code has not yet been adopted. See Law of the Russian Federation "On the Introduction into Operation of Part I of the Civil Code of the Russian Federation," art. 13 (December 1994).

<sup>10</sup> Rorem & Giovarelli, *supra* note 3, at 28-29.

<sup>11</sup> CSABA CSAKI & ZVI LERMAN, LAND REFORM IN UKRAINE: THE FIRST FIVE YEARS 16 (World Bank Discussion Paper No. 371, 1997).

be their most important work. With so much power and control vested in one agency, farmers have great incentive to hide land information, impeding the registration process.

#### D. Penalties for Land Use Violations

The consequences of violating land use requirements are often draconian, sometimes resulting in an extinguishing of land rights, excessive fines, or criminal sanctions. Even more severe, when land rights are taken, they are often simply confiscated, without compensating the owner and without a forced public sale. Such potential consequences create tenure insecurity for land owners and users (as well as prospective purchasers and mortgagees).<sup>12</sup>

Other types of restrictive land use requirements also have severe consequences. The Russian Federation and at least one Russian *oblast* have considered adopting rules requiring that when structures located on a land plot are destroyed by fire or flood, the owner of the plot will forfeit his land rights if he does not begin rebuilding the structure within a period of two years.<sup>13</sup> It may be neither possible nor prudent to rebuild after a disaster, and the landowner is in the best position to determine this. The consequence for not rebuilding--losing the right to the land--is severe and unnecessary.

Article 243 of the Russian Civil Code allows confiscation (without compensation) as a sanction for the "commission of a crime or other violation of law." The broad clause as to "other violation of law" can be read to allow confiscation, for example, if land is used in a manner inconsistent with future zoning rules which are wholly separate from and carry no consequences under criminal law.

Under the Uzbek Law "On Land," the rights of ownership and use of land can be withdrawn by local government bodies for many reasons, most of them broadly stated, including: violation of the lease contract; unlawful use of land; irrational use of land resulting in a less than normative yield for agricultural land; use that leads to a reduction in soil fertility or environmental harm; non-use of land for one year for agricultural land or two years for non-agricultural land; and non-use of land purchased at auction for lifetime inheritable use or non-use of pledged land.<sup>14</sup>

Uzbekistan's law has another related problematic provision. The Uzbek land law requires that once established, peasant farms must submit actual performance reports and periodic financial statements so that district officials can judge their progress and accomplishments. If

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<sup>12</sup> See Rorem & Giovarelli, *supra* note 3 at 23-30.

<sup>13</sup> Draft law of Samara *Oblast* of the Russian Federation "On Land," art. 51 (1998).

<sup>14</sup> Law of the Republic of Uzbekistan Law "On Land," art. 18 (June 20, 1990).

unsuccessful, the farm may be stripped of its land rights (use rights, because Uzbekistan does not allow for private ownership in this instance).<sup>15</sup>

Penalties represent the greatest threat to private land rights in those ECA country settings where the legislative standards are vague and are being applied by bureaucrats who are still hostile to the idea of peasant farming and other non-collective forms of ownership or use of agricultural land.

### **E. Non-Agricultural Uses of Agricultural Land**

There are two primary issues related to conversion of agricultural land to non-agricultural uses. First, there is concern that, without guidelines for conversion, development will be scattered throughout the urban-rural fringe. Most often, agricultural land is subject to conversion to non-agricultural uses when it comes within a community's potential zone of expansion. Conversion occurs characteristically on land nearest the city, but because competition for land at the immediate urban fringe increases its purchase price, development costs there are substantial. Thus, speculators and developers are attracted to more distant farmland that carries a smaller price tag and provides greater profit.<sup>16</sup> Second, countries with little arable land may be concerned about protecting farmland to assure future food supplies.

Legal provisions regarding non-agricultural uses of agricultural land may either address: (a) discrete non-agricultural development (a single residence or isolated business) within agricultural areas; or (b) broader conversions of agricultural land to non-agricultural uses (housing, industrial, or commercial developments). With a focus on preservation of arable land, some ECA countries have enacted flat prohibitions against, or cumbersome permitting procedures for, both types of non-agricultural uses of agricultural land. These prohibitions and permitting procedures (which are often subjective and non-transparent) can fail to recognize the changing needs of an agricultural operation or farm community and stifle appropriate non-agricultural growth and development. Appropriate land use regulations should balance a variety of competing factors, including urbanization pressures, population growth, population density, arable land per capita, and food security. Protecting the agricultural land base should be balanced with the need or desirability of using the land for commercial, residential, or other purposes.

Some countries restrict all non-agricultural uses of agricultural land.<sup>17</sup> For example, early in the reform period, the Baltic countries required that agricultural land be used exclusively for

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<sup>15</sup> Zvi Lerman, *Changing Relations and Farming Structures in Formerly Socialist Countries*, in *AGRICULTURAL LANDOWNERSHIP IN TRANSITIONAL ECONOMIES* 146 (Gene Wunderlich ed., 1995).

<sup>16</sup> Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 *Ecology* L...Q. 401, 403.

<sup>17</sup> William H. Meyers & Natalija Kazlauskene, *Land Reform in Estonia, Latvia, and Lithuania: A Comparative Analysis*, in *Land Reform*, *supra* note 5, 92-93, 103.



agricultural production. These requirements impeded the development of a land market.<sup>18</sup> The restrictions on using land for other than agricultural purposes in Lithuania were removed in May 1992, and local authorities were given authority to approve land use changes.<sup>19</sup>

Article 21 of the 1991 Bulgarian Constitution restricts the use of arable land solely to agricultural purposes. Changes in use are permitted only in exceptional circumstances, when there is a proven need, and on conditions and procedures provided by law.

Article 285 of Russia's Civil Code provides that land can be withdrawn from its owner if the parcel is not used in accordance with its designated purpose.<sup>20</sup> Ukraine requires that private agricultural landowners use their land only for farming.<sup>21</sup> Belarus' Law "On Rights of Ownership of Land" allows transfer or lease of land plots only if the transferee or lessee uses the land for the same purpose. Legislation provides that violation of this regulation results in confiscation of the land.<sup>22</sup>

Other countries have enacted cumbersome permitting and disincentive processes. As an illustration, Slovenia has long protected agricultural land from "misuse" through strict zoning regulations. A permit is required to convert agricultural land to nonagricultural uses. Not only is permission difficult to obtain, but such conversion, if administratively approved, is further discouraged through high taxation. The tax charged to convert agricultural land to "building" land can be up to the equivalent of U.S. \$8,000 for a one-house plot.<sup>23</sup> Drafts of a Russian land code have usually provided that any change in the designated use of land from agricultural to non-agricultural requires approval of the executive power of the subject (*oblast*, etc.) in which the land is located. However, these provisions include no standards for granting or withholding such approval.<sup>24</sup>

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<sup>18</sup> *Id.* at 103.

<sup>19</sup> *Id.* at 92-93.

<sup>20</sup> Art. 285 is in chapter 17 of the Civil Code, which does not become effective until Russia adopts a Land Code. See note 9, *supra*.

<sup>21</sup> Csaki & Lerman, *supra* note 11, at 16.

<sup>22</sup> *Belarus: Recent Developments in Land Legislation*, East/West Executive Guide, January 1, 1996, p. 1, available in LEXIS, World Library, ALLNEWS File.

<sup>23</sup> CHERYL W. GRAY & FRANJO D. STIBLAR, *THE EVOLVING LEGAL FRAMEWORK FOR PRIVATE SECTOR ACTIVITY IN SLOVENIA* 14 (World Bank Working Paper No. 893, April 1992).

<sup>24</sup> Draft Land Code of the Russian Federation, art. 14 (1998).

### III. Land Use Issues in Developed Market Economies

#### A. Non-Use and Rational Use of Land

Two concerns generally exist regarding non-use and rational use of land. The first concern is to prevent unused land or inefficiently used land from lowering overall production. The second concern is to prevent soil erosion or degradation on such land. Many of the Western European governments are not concerned about low levels of agricultural production. In fact, the European Union encourages some farmers not to produce in order to keep prices at a certain level.<sup>25</sup> Non-use is, therefore, less of a concern than irrational use.

German law does not prohibit non-use or "irrational" use of land. However, there are environmental programs that are encouraged nationally as well as by the European Union.<sup>26</sup> The United States also has no laws requiring use of land or rational use of land, with the exception of narrowly tailored regulations applying to land in environmentally sensitive areas.<sup>27</sup> Italy has laws regarding rational use and non-use, but they have not been seriously enforced. Moreover, the legal penalties are relatively mild and do not include loss of land. Italian law provides that lands not cultivated or insufficiently cultivated (yielding lower than 40% of the yield on land with similar fertility) for two years may be required to be either planted with bushes to prevent soil degradation or leased out by its owner.<sup>28</sup> Special Provincial Committees have been established to determine whether or not land is uncultivated or insufficiently cultivated. The regions prepare a list of uncultivated or insufficiently cultivated lands. If someone wants to cultivate such land, she must present a farm development plan. If the plan is accepted, the land will be leased to the applicant. The nature and duration of the lease are determined by law. The region must advise the owner that his land will be put on the list of uncultivated land and that there has been a request to lease the land.

According to several studies, much of the uncultivated lands are unproductive and difficult to cultivate because they are located on hills and mountains. In the Veneto Region, for

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<sup>25</sup> For many years during the post-war period, U.S. farm legislation, focusing on over-production, also required farmers to take a portion of their land out of production in order to qualify for certain price support programs. DAVID RAPP, *HOW THE U.S. GOT INTO AGRICULTURE AND WHY IT CAN'T GET OUT* 174 (1988).

<sup>26</sup> See *Agrarbericht of the Federal Government 1996*, Tz. 278 und *Bavarian Agrarbericht 1996*, Ziff. 2.7.3.2. as cited in Christian Grimm, *Rural Land Law in Germany* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>27</sup> Laws regulating environmentally rational use in sensitive areas include: the Federal Clean Water Act, 33 UNITED STATES CODE sec. 404 (1998) (restricting use of land adjacent to shoreline and wetlands); state-level "Growth Management Acts" (WASHINGTON REVISED CODE sec. 36.70A) (assigning to local governments responsibility to regulate private land use for wetlands protection); and state-level "Shoreline Management Acts" (WASHINGTON REVISED CODE sec. 90.58) (providing for joint local and state regulation of private land-use on land adjoining shorelines and wetlands).

<sup>28</sup> Land Law of Italy No. 440 "On Norms for the Use of Uncultivated, Abandoned, and Non-Sufficiently Cultivated Land" (August 4, 1978).

example, 80% of the uncultivated land was located in the alpine and pre-alpine areas. Moreover, by the end of the 1970's and the beginning of the 1980's cultivating such abandoned land was no longer necessary because there was a surplus of agricultural goods on the European Union market, and the European Union started to finance programs of set-aside to solve the surplus of agricultural production.<sup>29</sup>

As to rational use, Italian law provides that if a landowner does not mow an abandoned meadow, the local authorities will mow the meadow and charge the cost to the local landowner.<sup>30</sup>

French laws regarding land use are similar to Italy's use laws. As in the case of Italy, the laws are rarely enforced because they only relate to agricultural use, and there is little political will to enforce them. More stringent rules on use of land and state intervention in the form of reallocation of land have been considered and rejected.<sup>31</sup> There are approximately 7.4 million hectares of uncultivated land in France, of which 6.7 million (8.4% of the useable agricultural surface) are potentially useable.<sup>32</sup>

Nonetheless, French law provides that two things may happen to undeveloped land. First, if land is not used for three years (two years in the mountains, and one year under certain circumstances for perennial crops), and someone else is interested in developing the land, the interested party may apply to the prefect to commission the department on land management to classify the land as uncultivated. The classification is advertised to allow all interested farmers to apply for use of the land. The prefect informs the owner, and the owner must decide within two months to develop the land within the year or to rent it out for development within one year. If there is no response or a refusal to act, the prefect grants the interested party an authorization to develop. The decision of the prefect can be contested in the administrative court and the court will arrange the conditions of the forced land lease.<sup>33</sup>

Second, the prefect may commission the department on land management to take a census of land areas that are fallow and might be used for pasture, cultivation, or forestry. The prefect will then publish a public notice of the results and notify each landowner individually. The owner has three years to cultivate or use the land. If the owner does not comply or surrenders his claim to the land, the prefect can either grant the cultivation of the land to a third

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<sup>29</sup> Danilo Agostini, *Rural Land Law in Italy* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>30</sup> *Id.*

<sup>31</sup> Isabelle Couturier, *Rural Land Law in France* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>32</sup> *Id.*

<sup>33</sup> AGRICULTURAL CODE OF FRANCE art. L125-1.

party (voluntarily or by force) or assist the landowner with a voluntary sale of the land, or expropriate the land for public benefit.<sup>34</sup>

In sum, while land can be taken in France for non-use, the law is rarely invoked. Even if land is identified as unused, the owner has many chances to work the land himself or lease or sell the land to a private party. Moreover, if that land is taken, the landowner is compensated for the taking.

In Japan, where there is much greater population pressure on the agricultural land base than in most of Western Europe or in North America, more stringent actions are taken against owners of agricultural land if land is not being cultivated or is being cultivated inefficiently. They are as follows:

- The Agricultural Committee provides assistance to those identified as not using or inefficiently using land.
- If this does not result in proper cultivation,<sup>35</sup> the Agriculture Committee requests that the mayor issue a non-legally binding "recommendation."
- The mayor issues the recommendation to the owner of idle land.
- If the owner does not conform to the recommendation, the mayor notifies the owner that he should negotiate with the Agricultural Land Holding Rationalization Corporation (ALHRC) to sell or lease the land. The owner is not permitted to refuse.<sup>36</sup>
- Land acquired by the ALHRC is sold or leased to a "recognized farmer." If the mayor or local agricultural cooperative wishes to lease the land, and place it into joint use but the owner refuses, there is a system in the Agricultural District Act which allows for compulsory establishment of a leasehold by order of the prefecture governor. This is called a "special use right."<sup>37</sup>

Thus, in Japan, forced sale or lease (with the proceeds to the erstwhile landowner) can occur in the event of persistent non-use or inefficient use. In contrast to the situation in some

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<sup>34</sup> *Id.* L125-5.

<sup>35</sup> Japan Agricultural Management Act, art. 27, para. 1

<sup>36</sup> The agricultural landholding companies are public corporations formed to facilitate the concentration of landholdings via economic regulation of leasing. They do this by acquiring voluntary 10-year leases from agricultural landowners in exchange for a lump-sum payment covering ten years of rent. They then re-lease the land to selected farmers who pay rent annually to the corporation. The corporations are formed jointly by municipalities, corporations and prefectural governments. Agricultural Basic Law of Japan, art. 3, item 2 (1970), as cited in *Changes in Japan's Agrarian Structure* 42 (Food and Agriculture Policy Research Center 1998).

<sup>37</sup> Agricultural District Act of Japan, secs. 15-7 -15-14.

ECA countries, however, the bureaucracy administering these rules is relatively free of corruption and well-disposed towards family farms and private land rights.

## **B. Soil Preservation and Amelioration**

Most developed countries are concerned with soil conservation as an environmental issue, and regulation of factors affecting the soil are typically found in environmental laws, not land laws.

German laws regarding soil preservation appear to be reasonably restrictive although clear guidelines have been set. For example, one factor affecting agricultural soil is the use of fertilizers. Under German law, the law of fertilizers<sup>38</sup> provides that fertilizers must not be applied other than "in accordance with good professional practice." Good professional practice is defined as adjusting the kind, quantity and time of fertilization to meet the need of the plants and soil, taking into consideration the nutrients and the organic substance in the soil as well as the conditions of the location and kind of cultivation.

A separate German decree contains details. For example, all agricultural enterprises must take specimens and have them analyzed by approved scientific methods. Enterprises that violate these soil laws are excluded from government financial aid. Generally, most enterprises comply. Other sanctions existing for specific violations are catalogued in the soil law.<sup>39</sup>

On March 17, 1998 the Deutsche Bundestag enacted a soil protection law.<sup>40</sup> The purpose of this law is to protect the soil for future generations or to ameliorate contaminated soil. Detrimental changes to the soil are not allowed, and contaminated soil must be rehabilitated. The law contains rules for "good professional practice" for agriculture, which include:<sup>41</sup>

1. the weather and location must be taken into account for soil cultivation;
2. the structure of soil will be maintained or improved;
3. compression of the soil must be avoided as much as possible;
4. erosion is to be avoided by considering the inclination of the land, the water and wind conditions, and the covering of the soil;
5. the characteristic natural elements of open fields will be maintained, especially hedges, copses, edges, and terraces;
6. crop sequencing must be practiced; and

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<sup>38</sup> Düngemittelgesetz vom 15.11.1977, BGBl. I S. 2134, as cited in Grimm, *supra* note 26.

<sup>39</sup> *Id.*

<sup>40</sup> Gesetz zum Schutz vor schädlichen Bodenveränderungen und zur Sanierung von Altlasten (Bundes-Bodenschutzgesetz-BBodSchG), BGBl. I S. 502, cited in Grimm, *supra* note 26.

<sup>41</sup> *Id.* sec. 17

7. humus layer must be maintained by sufficient feeding with organic substances or by reduction of the intensity of cultivation.

Violations of these rules are subject to fines.

To compel citizens to comply with soil conservation laws, the following sanctions may be applied:

- cost of physical compliance by the authority or a third party;
- executive order compelling action (used if compliance by government officials or a third party would be dangerous);
- fines; and
- direct compulsion of an action).<sup>42</sup>

Criminal sanctions can also be applied.<sup>43</sup> Criminal offenses are punished by prison or fines. Infringements are punished with fines.

In the United States, federal, state and local rules encourage but generally do not require good soil management practices. At the federal level, farmers must continue to comply with environmental regulations and soil conservation measures in order to be eligible to receive federal subsidy payments.<sup>44</sup> The federal government also has several voluntary conservation programs where, in exchange for federal grants, farmers agree to adopt "best management practices" for protecting soil and water quality.<sup>45</sup> Finally, the federal Environmental Protection Agency has adopted state water quality standards which require the states to curtail farm erosion. It is up to each state how to achieve compliance with the Environmental Protection Agency standards. Most states have adopted voluntary programs toward this end, although some states, such as California, have given water control agencies the authority to issue "cease and desist orders" to stop severe soil erosion.<sup>46</sup>

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<sup>42</sup> Die Rechtsgrundlagen für ihre Anwendung finden sich in den Verwaltungsvollstreckungsgesetzen des Bundes und der Länder. Einzelheiten s. z.B. bei H. MAURER, *Allg. Verwaltungsrecht*, 11. Aufl. München 1997, S. 437 ff., cited in Grimm, *supra* note 26.

<sup>43</sup> Environmental criminal law has a separate section under "Criminal acts against the environment" in the German Criminal Code (StGB).

<sup>44</sup> United States Public Law No. 127, sec. III (1996).

<sup>45</sup> Telephone conversation with Bruce Eisenman, Resource Conservationist for the Natural Resources Conservation Service, June 22, 1998. See also Greg Mohrman, *United States Agricultural Subsidies*, May 15, 1996 (memorandum on file with the Rural Development Institute).

<sup>46</sup> *Id.*

Compliance with soil conservation standards for federal and state programs is administered through local branches of the Natural Resources Conservation Service and the Farm Service Agency. Compliance is usually based on voluntary certification by the farmer that she is following the prescribed practices.

Some states in the United States use tax incentives to encourage soil conservation. Wisconsin state tax rules, for example, require farmers to adhere to soil and water conservation standards in order to participate in that state's tax reduction programs.<sup>47</sup>

Many local governments in the United States have adopted their own erosion control ordinances. These usually provide for civil or criminal prosecution in the event of extreme erosion-causing practices (agricultural or otherwise) and give local public works departments the authority to bill private landowners for damages caused to roads and other infrastructure by erosion from their land. Penalties (maximum \$500/day for ongoing violations) are imposed on the person, not on the land. Most ordinances require that the local government, prior to prosecution, notify the landowner of her violation and give her the opportunity to work with the Natural Resources Conservation Service or a similar local agency to develop and follow a compliance plan.<sup>48</sup>

United States environmental laws provide that the state can seek injunctive relief against persons responsible for hazardous substance releases, if the release poses an "imminent and substantial endangerment." Once land is contaminated, all owners of contaminated property are required to pay the cost of the clean-up, even if it exceeds the value of the land. The exception to this rule is "innocent landowners" who acquire property without reason to know that hazardous substances have been disposed of there. However, if "innocent landowners" learn of the hazardous waste and then transfer the property without notifying the buyer, the "innocent landowner" becomes fully responsible for the cost of the clean-up.

In Japan, there are no legal provisions covering normal cultivation methods. The Soil Conservation Act of 1970 provides for projects funded by the Ministry of Agriculture to improve soil. Soil improvement and irrigation projects are carried out under the Land Improvement Act of 1949 as well.

### C. Penalties for Land Use Violations

Penalties for violations of land use regulations are discussed throughout this comparative section. Penalties include:

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<sup>47</sup> William L. Church, *Stewardship of Land and Natural Resources: Farmland Conversion, The View from 1986*, 1986 UNIVERSITY OF ILLINOIS LAW REVIEW 521, n.114 (1986) (citing WISCONSIN STATUTES ANNOTATED secs. 91.13 (8)(d), 92.104 & 92.105 (1998)).

<sup>48</sup> Eisenman, *supra* note 45.

- fines;
- injunction;
- inability to receive government funding;
- criminal sanctions;
- forced lease or sale with the proceeds going to the owner; and
- government or third party action to ameliorate damage at owner's expense.

None of the developed market economies whose laws have been reviewed above confiscate land for land-use violations. Even forced sale appears to be quite rare as a penalty.

#### **D. Non-Agricultural Uses of Agricultural Land**

There are a variety of ways to protect the agricultural land base or to otherwise manage non-agricultural growth without prohibiting or severely restricting non-agricultural uses of agricultural land. These include: (a) restrictions and disincentives (or incentives) on growth of non-farm activity; (b) limiting prohibitions or restrictions on normal farm activities that are a nuisance to non-farm neighbors; and (c) discouraging depopulation of agricultural areas while encouraging resettlement into these areas. Each of these general approaches is discussed below.

##### **1. Change of Use of Agricultural Land**

In Japan, any type of crop can be grown on agricultural land with the exception of rice. Japanese law generally prohibits development of new rice fields because of production restrictions on rice due to a surplus.

Over the past fifty years, the Japanese government has eased restrictions that prevent owners of agricultural lands from converting some, or all of their fields, to non-farm uses, in order to sustain industrial growth. This has produced urban growth that pressures small landholders to convert their farms to other uses, particularly where planning zones now permit conversion of arable land. A permit under the Agricultural Land Act is required to convert agricultural land to non-agricultural use, which includes industrial, commercial, residential, or forestry use.<sup>49</sup> In some locations, farmers can convert all or part of their arable land to other uses easily. The relaxation of restrictions on conversion occurred via land use zoning processes described below.

Under Japan's land use law, there are three types of agricultural land. *Type One* agricultural land is high-productivity land. *Type Three* agricultural land includes: land within an area where urban land readjustment projects are being carried out; land with gas, water, or other services; and agricultural land which is surrounded by urban land or otherwise is within a district

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<sup>49</sup> Japan Agricultural Land Act of 1952, arts. 4-5.



with an urban environment.<sup>50</sup> *Type Two* agricultural land is land that falls between Types One and Three, or is agricultural land located in an area that will be urbanized in the near future.

As a rule, if land is Type One agricultural land, permits are never granted. If land is Type 3, permits are granted. If land is Type Two, permits are granted if Type Three land is unavailable or unsuitable.

If the land to be converted is four hectares or more, the permit is granted by the Minister of Agriculture; otherwise the permit is granted by the prefectural governor. Conversion without a permit is subject to an administrative penalty.

Germany's policies are aimed more at decreasing agricultural production rather than increasing it and, therefore, generally do not limit reductions in the area of land being cultivated. In fact, legal restrictions exist on what land can be used for cultivation. The European Union, the national and the Länder-level governments all have programs that restrict certain areas to non-agricultural use. Reforestation of agricultural land is also being encouraged by the European Union and the national level government.<sup>51</sup>

In an effort to retain aesthetic agricultural character in agricultural areas, Germany has developed rules that govern building on traditional agricultural land if the building relates to agricultural use. There are three planning areas according to the rules of the Law of Buildings:

- 1) area of development planning;
- 2) unplanned interior area (land area between connecting buildings); and
- 3) exterior area

In the area of development planning, a building project is permitted independent of its use purpose if it corresponds to the regulations of the development plan.<sup>52</sup> In the unplanned interior area, a building is permitted independent of its use if it fits in with surroundings according to the type and extent of the use of the building, the type of construction and the size of the plot.<sup>53</sup>

All areas that are not registered as an area of development or an unplanned interior area are regarded as exterior areas. These areas must be kept free of buildings as much as possible. Buildings permitted in an exterior area include agricultural buildings if they only occupy a small part of the agricultural landholding.<sup>54</sup>

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<sup>50</sup> Agricultural land within an Urbanization Promotion Area under the Town Planning Act of 1970 may be converted without a permit; only notification to the Agricultural Committee is required.

<sup>51</sup> Details in the *Agrarbericht der Bundesregierung* 1996, Tz.218. as cited in Grimm, *supra* note 26.

<sup>52</sup> Secs. 29,30 BauGB, as cited in Grimm, *supra* note 26.

<sup>53</sup> See secs. 29,34 BauGB, as cited in Grimm, *supra* note 26.

<sup>54</sup> This is approved by the administration and the jurisdiction. These buildings are called "Austragshäuser."

French conversion law is a compilation of zoning, environmental and national and regional development law. The general framework is provided for in the local plan of land occupancy (POS). The POS identifies agricultural zones which are protected from urban development and separate urban development or industry zones.<sup>55</sup> If there is no POS due to a very limited land market, only construction necessary for agricultural activity is permitted outside of the parts currently urbanized. Agricultural construction which occurs in an agricultural zone or outside of an area currently urbanized must be authorized on a case by case basis and can include greenhouses, barns, stables, and residential houses. The assessment is very subjective. For example, construction of a residential house for a son who provides only occasional help on the farm might be refused.<sup>56</sup>

French law places restrictions on lessees of agricultural land. If the lessee changes the use of agricultural land and disregards his obligation to cultivate the land, the lease can be terminated. If the activity remains subordinate and the land is well maintained, the lessee will not be penalized.<sup>57</sup> If a lessee wants to change the type of farming he pursues, for example change to organic farming, or change from crop use to pasture use, he must notify the landowner who may contest the decision in court.

In the United States there is an ongoing debate about whether or not the loss of farmland to urban development is cause for concern. On the one hand, millions of acres of American cropland are not now in production. On the other hand, the best farmland is likely to be lost first because urban expansion often occurs closest to the most productive farmland.<sup>58</sup>

The United States has federal, state, and local laws aimed at reducing, or at least slowing, the conversion of agricultural land to non-agricultural uses. At the federal level, the Farmland Protection Policy Act of 1981<sup>59</sup> was the first program to address the issue. This Act, which applies only to federal agencies, simply requires the agencies to consider whether their actions would tend to adversely affect agricultural lands. The United States Department of Agriculture has developed criteria for the mandated evaluation. The Act has not had a practical effect

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<sup>55</sup> The POS must take into account the Town Planning Code, and the directives for Landscape Protection (Law of January 8, 1993 & April 11, 1994).

<sup>56</sup> Couturier, *supra* note 31.

<sup>57</sup> Review of French Rural Law, Appeals Court decision of October 10, 1982, at 270, *as cited in* Couturier, *supra* note 31.

<sup>58</sup> Church, *supra* note 47.

<sup>59</sup> Farmland Protection Policy Act, 7 UNITED STATES CODE ANNOTATED secs. 201-209.

because it does not require mitigating measures, prohibit conversion of agricultural land to non-agricultural uses, or provide for a private enforcement mechanism.<sup>60</sup>

A second federal regulation affecting conversion, the Farms for the Future Act, was enacted in 1990.<sup>61</sup> This act provides for federally guaranteed loans and interest rate assistance for private loans to state-operated land preservation funds. As of 1993, only the U.S. state of Vermont had an approved trust fund in place.<sup>62</sup>

State and local laws addressing farmland conversion in the United States take a variety of shapes and work to limit conversion in different ways. State agricultural districting laws provide for the opportunity and incentives for agricultural landowners to join agricultural districts. Benefits of joining can include: (a) limitations on state and local regulations that would otherwise impede agricultural operations; (b) zoning protection; (c) differential tax assessments; (d) limitations on eminent domain actions; and (e) programs for obtaining development rights. The districting programs often require (in exchange for the benefits) that the landowner keep the land in the program for a number of years (thus restricting conversion).<sup>63</sup>

Zoning schemes in the United States, which are generally enabled by state statutes and administered by local governments, are used in a variety of ways to limit conversion. A few United States jurisdictions use exclusive agricultural zoning that simply prohibits the non-agricultural use of land within what is otherwise deemed an agricultural area. Because this zoning approach severely limits home construction and uniformly prevents farmers from selling any of their land for non-agricultural uses, it is not favored and has not been frequently implemented.<sup>64</sup>

Non-exclusive agricultural zoning has been more widely implemented in the United States. Non-exclusive agricultural zoning provides for four primary approaches: (a) large-lot zoning; (b) area-based allocation zoning; (c) sliding scale, area-based allocation zoning; and (d) conditional use zoning. These approaches are aimed at discouraging but not prohibiting conversion to non-agricultural uses.

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<sup>60</sup> K. Jack Haugrud, *Agriculture* 483-84 in *SUSTAINABLE ENVIRONMENTAL LAW* (Celia Campbell-Mohn et al., eds., 1993).

<sup>61</sup> Public Law 101-624, Title XIV, Subtitle E, Chapter 2, Nov. 28, 1990, 104 Stat. 3616.

<sup>62</sup> Haugrud, *supra* note 60, at 484.

<sup>63</sup> *Id.* at 487.

<sup>64</sup> Jacqueline P. Hand, *Right-to Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 UNIVERSITY OF PITTSBURGH LAW REVIEW 296 (1984).

Large-lot zoning simply requires that each non-agricultural use be situated on a lot of a minimum size. The minimum size is typically from four to 260 hectares, and ideally should match the size of the surrounding farms.<sup>65</sup>

Area-based allocation zoning permits a fixed number of non-agricultural lots per a fixed number of agricultural hectares. For example, for an agricultural area of 16 hectares, one non-agricultural lot might be permitted. For 160 hectares, ten lots would be permitted. Under this approach, the non-agricultural lots are relatively small, and they are frequently permitted to be closely grouped (leaving larger areas of contiguous land for farming).<sup>66</sup> Some area-based allocation zoning ordinances require the non-agricultural lots to be placed on less desirable farmland.<sup>67</sup>

Sliding scale, area-based allocation zoning does not fix a set number of non-agricultural lots per hectare of farmland, but rather permits a certain number of non-agricultural lots on the basis of some other criterion. For example, each land parcel or holding may be permitted a fixed number of lots (and thereby permit a small parcel to have as many as a larger parcel); the number of non-agricultural lots may be determined according to soil quality characteristics.<sup>68</sup>

Finally, conditional use zoning allows subdividing farmland for non-agricultural uses if certain criteria are evaluated and considered satisfactorily met. Criteria can include the amount of prime farmland affected, the number of dwellings to be built, and impacts on local infrastructure.<sup>69</sup>

A variety of property tax relief approaches are also used in the United States to provide incentives for farmland owners to leave their property in agricultural use. For example, many states have enacted differential taxation plans. That is, agricultural land is taxed at its agricultural use value rather than at its development value. Some states that have implemented differential taxation only defer the tax until the property is converted to a non-agricultural use. At conversion, the deferred amount is collected for some number of past years (usually from four to seven). Other states agree to differential taxation only if the property owner agrees to keep the land in agricultural use for a certain number of years. If the agreement is kept, no deferred tax will be collected if conversion is made after the term of the agreement.<sup>70</sup> Yet another approach to differential taxation is provided by "circuit breaker" tax credits, which provides for a tax credit against state income taxes if a landowner's property tax exceeds a certain percentage of the

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<sup>65</sup> Haugrud, *supra* note 60, at 490.

<sup>66</sup> *Id.* at 296.

<sup>67</sup> *Id.* at 490.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 491.

<sup>70</sup> *Id.* at 491-92.

landowner's income.<sup>71</sup> A final taxation-related approach to reducing the economic incentive to convert farmland to non-agricultural uses involves exemptions to tax assessments levied on landowners who benefit from infrastructure (sewer, water, and the like) improvements. For example, if an agricultural landowner were not to make use of a new infrastructure improvement, the landowner would be permitted to decline to pay the tax assessment. If the landowner desired to make partial use of the improvement, a partial assessment is permitted. If the property is later converted to non-agricultural use, the full assessment will be re-imposed.<sup>72</sup>

Several U.S. states, through local governments, have authorized the creation of anti-development easements that are created through the purchase or other acquisition of development rights. Under these approaches, the landowner, by way of sale, lease, gift, grant, or bequest, gives up the right to develop the property beyond the agricultural use. The holder of the easement or development right can be the government or a private entity. The term can be for a number of years or in perpetuity. A similar approach is provided through the creation of transferable development rights. First, a preservation district (agricultural area) and a development district (non-agricultural area) are established. Then landowners in the preservation district are permitted to sell their development rights to landowners in the development district, enabling the latter to develop land more intensively for non-agricultural purposes than would otherwise be permitted. Through this arrangement, agricultural landowners are able to reap the economic benefits of development.<sup>73</sup>

Finally, some U.S. states have developed and implemented comprehensive state-wide development plans that include provisions governing the conversion of agricultural land to non-agricultural uses. In some ways similar to zoning regulations, these planning laws provide for a comprehensive approach to land use planning and set out detailed goals and exhaustive planning criteria. Typically, urban and suburban growth boundaries are first established. During this process, agricultural land may be preserved as such within the proposed growth area.<sup>74</sup> When asked to determine the ideal criteria concerning what agricultural land should be considered for agricultural conversion, one state planning representative suggested the following: (a) soil quality of the agricultural land; (b) the degree of community development surrounding the agricultural land and the existence of agricultural and urban support systems near the land; (c) the effect the land use change would have on local agriculture; (d) the applicant's ability to realize a reasonable return on the fair market value of the land; (e) the availability of non-agricultural or secondary agricultural land reasonably suited to the project; (f) the land's economic viability for agricultural purposes including whether it is already severely limited by conflicts with urban uses; (g) whether development of the land would complete a logical and viable neighborhood and help create a stable limit for urban development; (h) the proximity of the land to streets, rights of

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<sup>71</sup>*Id.* at 492; Hand, *supra* note 64, at 294.

<sup>72</sup> 84 REVISED CODE OF WASHINGTON secs. 34.300-380 (1995).

<sup>73</sup> Haugrud, *supra* note 60, at 492-93; 84 REVISED CODE OF WASHINGTON secs. 34.200-240 (1995).

<sup>74</sup> Washington State Growth Management Act, REVISED CODE OF WASHINGTON ANNOTATED sec. 36.70A.

way, parks and other public infrastructure; (i) whether the project for which the land is sought is of significant commercial value; and (j) protection of critical areas including aquifers, flood plains, wildlife habitats, geological hazardous areas, and wetlands.<sup>75</sup>

## 2. Potential Legal Liabilities for Normal Farm Activity

In the United States, as urban growth occurs, residential and urban areas are moving closer to existing farms. Farmers have been concerned that their normal farming activity would be curtailed because it is a "nuisance" to their new neighbors. A "nuisance" can be broadly defined as a significant interference with the use or enjoyment of the land and is a legal cause of action in the United States.<sup>76</sup> Odor from a livestock farm might be considered a nuisance. Forty-nine of the 50 states have enacted "Right to Farm" laws. These laws have uniformly provided that agricultural operations will not be deemed a nuisance as a result of the changed conditions (such as increased residential population) in or around its locality if the operation has been in existence for one year. These laws do not generally apply in cases of pollution of water or streams, or activities which have adverse health impacts.<sup>77</sup> Nuisance actions are private legal actions; the state does not participate in the action as a party.

In Germany, a farmer must obtain permission to establish and operate enterprises that are likely to be a nuisance including, for example, intensive livestock holdings.<sup>78</sup> The procedure for approval is very formal and requires public participation.<sup>79</sup> The application and the plan are available to the public, and citizens have the opportunity to raise objections. This costly and lengthy procedure, however, is advantageous to the holding if permission is given. Once the enterprise receives approval, its actions can no longer be contested. However, neighbors can still request that the enterprise modernize according to available technology or can make claims for compensation, if the modernization would be too costly.<sup>80</sup> Enterprises that do not need permission may also be required to modernize.<sup>81</sup>

<sup>75</sup> Telephone interview with Peter Riley, Washington State Department of Community Trade and Economic Development, Growth Management Division (notes on file with the Rural Development Institute, November 1995).

<sup>76</sup> STEVEN EMMANUEL, TORTS 281-89 (1988).

<sup>77</sup> Hand, *supra* note 64, at 289, 297-98.

<sup>78</sup> "Bundesimmissionsschutzgesetz"(BImSchG) (federal law against air pollution), s. FN 43. See also, Verordnung über genehmigungsbedürftige Anlagen -4.BImSchV- (Neufassung) Bek. vom 14.3.1997, BGBl. I S. 504 (public legal protection) and Bürgerliches Gesetzbuch vom 18.8.1896, RGBl. S. 195, BGBl. III 400-2 (Civil Code Provisions), as cited in Grimm, *supra* note 26.

<sup>79</sup> Sec. 4 par. 1 BImSchG, as cited in Grimm, *supra* note 26.

<sup>80</sup> Sec. 14 BImSchG, as cited in Grimm, *supra* note 26.

<sup>81</sup> In contrast to this public air pollution control, civil air pollution control (akin to the U.S. private actions for nuisance) has lost its importance. The most important rules of the civil law protection of the neighborhood are stated in sec. 906 BGB (Civil Code of Germany).

Japan has no statutory regulations governing farm nuisances. However, complaints from local citizens can cause the mayor to exercise administrative guidance to move an animal barn, to place time limits on the daily use of agricultural machinery, or to regulate spraying of pesticides.<sup>82</sup>

Under French law, building permits may be denied for a residence if the residence would be exposed to farm nuisances.<sup>83</sup> Conversely, farm neighbors can sue farmers in court if the farmer's actions were negligent or the farmer did not take measures to avoid creating a nuisance.<sup>84</sup> The statutory law regarding nuisance has been further defined by court decisions. Such decisions have held that each neighbor must withstand normal inconveniences resulting from the type of neighborhood she lives in. Beyond these normal inconveniences, the neighbor may receive compensation. There are no clear guidelines for "normal" and no fault on the part of the farmer is required. Thus, an activity may actually be authorized by administrative authorities, but the farmer may later be required to pay damages to his neighbor.<sup>85</sup> French nuisance actions are somewhat limited by a law providing that if the victim moved in after the beginning of the nuisance activity, and the activity is legal and has not worsened since the victim moved in, the victim cannot receive compensation.<sup>86</sup>

### **3. Discourage Rural Depopulation; Encourage Resettlement into Rural Areas**

Rural depopulation is an issue in parts of the ECA, such as many of the northern *oblasts* of European Russia. There are, however, important questions as to whether instances of rural depopulation represent a genuine problem, or are simply a rational response to economic conditions and the suitability of farming in particular regions.

Japan, Italy, and France fund development programs in rural areas to discourage urbanization. Japan has passed several laws designed to maintain and increase the population in the countryside through promotion of regional industries and improvement of transportation and social services in rural and mountain villages.<sup>87</sup>

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<sup>82</sup> Isoshi Kajii, *Rural Land Law in Japan* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>83</sup> CITY PLANNING CODE OF FRANCE art. R 111.3.

<sup>84</sup> CIVIL CODE OF FRANCE arts. 545, 1382-83.

<sup>85</sup> Couturier, *supra* note 31.

<sup>86</sup> BUILDING AND HOUSING CODE OF FRANCE art. L112-16.

<sup>87</sup> The Mountain Village Development Act (1965); the Law on Urgent Measures for Development of Depopulated Areas (1970) and its successor laws; the Law on Special Measures for of Depopulated Areas (1980); the Law on Special Measures for Revitalization of Depopulated Areas (1990); and the Law for Revitalization of Specified Rural and Mountain Villages (1993).

Italy's goal has been to preserve the mountain villages. Like Japan, the legislation is aimed at the socio-economic development of mountain areas, development and improvement of transportation systems, development of local economies, and provision of adequate social and cultural services.<sup>88</sup>

In France, there is great concern about depopulation of rural areas. Depopulation is provoked by the decline in rural economic activity, particularly the declining role of agriculture in the overall economy. Despite this trend, rural populations have not declined overall because rural communities close to urban centers are growing in population at the same time other more remote areas are declining.

Since 1975 and again in 1985, the French government has tried to halt this trend in the mountains and low land-quality zones. Laws passed in 1980 and 1995 support agriculture and the use and protection of the environment. Rule 2078-92 of the European Council of June 30, 1992 implements these programs called "Programs for Global Management of Rural Areas."

France's Programs for Global Management of Rural Areas allow local areas to establish a committee to design a project with economic, social, and cultural opportunities and incentives for production in a particular zone. The local administration then examines the project, and the group and the zone accept or reject the project. If the project is accepted, funds are provided from either the European Union, the national, or the local level government depending on the project. One criticism of these programs has been the development of multiple and contradictory projects.<sup>89</sup>

France has also developed sectoral programs to revive different sectors of activity within their geographical context. Moreover, much educational and financial assistance is provided to farmers to assist them in diversification, improving production methods, modernization, land use planning, and improving environmental techniques. Government funds are also available for rehabilitating fragile and desertified rural zones. Additional funds are provided to those who are farming in special mountain areas and other poor quality zones.<sup>90</sup>

The United States does not have any specific federal or state laws that discourage depopulation of the countryside or encourage resettlement in depopulated rural areas. The federal government has undertaken some poverty alleviation programs that focused on development problems in regions that contain substantial rural populations.

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<sup>88</sup> Agostini, *supra* note 29.

<sup>89</sup> Couturier, *supra* note 31.

<sup>90</sup> See the law of 9 January 1985 (mountain regions); C.E.F. ruling of 15 July 1991; RURAL CODE OF FRANCE art. R113-13.



#### **IV. Checklist of Potential Impediments and Solutions**

This section summarizes the above sections by describing the potential impediments that have been identified in ECA countries and potential solutions to these impediments that have been identified in developed market economies. The potential solutions are not uniform prescriptions and will not apply to every country. For example, in most ECA countries, with their past histories of bureaucratic involvement and hostility to private rights in land, the preferred solutions should in general be ones that minimize regulation, bureaucratic power, and administrative discretion. This preference should be even stronger in ECA country settings where other special features are present: for example, where the agricultural land base is large relative to population, or where the local bureaucracy is considered especially inept, corrupt, or ideologically hostile.

##### **Potential Impediment: Land is Confiscated for Irrational Use or Non-Use.**

Over-broad requirements that land be continuously or rationally used and harsh sanctions for non-compliance (confiscation, and/or withdrawal) are impossible to administer in a principled way and affect security of land tenure.

##### **Potential Solutions**

- Rely on market incentives to generally propel agricultural land to its highest and best agricultural use with few state controls.
- Legal provisions to facilitate the leasing-out of agricultural land that is unused or inefficiently cultivated could promote productivity without eliminating the ownership rights of the landowner. The lease should only be mandated after local government assistance has been provided and sufficient notice has been given to the landowner. Voluntary leases are preferable. The lease should be short-term, or else terminable (after an initial guaranteed period) at the landowner's option when he is prepared to resume farming the land; and the lease payment should go to the landowner.
- Legal provisions requiring a forced sale only after formal notice, an opportunity to rectify, and a prior opportunity to lease would minimize the outright loss of property. Provisions requiring a forced sale should be implemented only in extreme cases of misuse, which are clearly defined. Proceeds of the sale should go to the landowner (otherwise the sale would constitute confiscation, severely undermining private land rights and seemingly contrary to the new constitutions of many ECA countries).

- Where a lack of routine maintenance or other minor omissions create irrational use, legal provisions allowing government action and a service charge levied on the landowner can provide for a reasonable solution.
- Protect against particular types of undesirable use that are unlawful by enacting specific regulations that reasonably define objectionable uses and describe the related policies to be promoted by way of environmental regulations and comprehensive land use planning.

**Potential Impediment: Requirements to Increase Quality or Productivity of Soil Provide Avenues for Continual Unnecessary Infringement in Private Land Rights by the State.**

Over-broad requirements to improve soil quality that lack objective standards and carry severe sanctions for non-compliance are impossible to equitably administer and are an unnecessary interference by the state.

**Potential Solutions**

- Forego soil quality improvement regulation in its entirety and rely upon farmer self-interest to prompt such improvements.
- Where farmers need information and guidance as to soil management, provide government sponsored and funded programs to teach these skills in soil improvement.
- Promulgate clear guidelines as to soil management and quality subject to fines for gross violations only.
- Monitor soil quality and condition pursuant to specifically defined use regulations and standards for fertilizers or other inputs. Where violations rise to the level of pollution or contamination, impose appropriate legal sanctions. Where violations fall short of this level, withhold government financial aid.
- Adopt legal enactments that allow the government to charge the landowner for government action required to ameliorate soil, or to repair damages to public property caused by soil erosion. Such government action should only be allowed in severe cases and only after the landowner has been given adequate time and notice to correct the condition.
- Condition receipt of public agricultural benefits including subsidy payments, participation in soil and water quality programs, and tax incentives, on compliance with soil quality standards.

### **Potential Impediment: Penalties for Land Use Violations are Overly Severe.**

Some penalties and sanctions for non-compliance with agricultural land use laws (excessive fines, inappropriate criminal penalties, confiscation, forced sale) can cause insecurity of land rights and limit land market transactions.

#### **Potential Solutions**

- Eliminate the prospect of land confiscation as a legal penalty for non-compliance with land use laws.
- Provide in law for appropriate notice and process mechanisms before levying fines, forcing sales, or forcing leases.
- Allow landowners the opportunity to work with public agricultural support entities to devise and implement a compliance plan before levying penalties.

### **Potential Impediment: Converting Agricultural Land to Non-Agricultural Uses is Severely Restricted.**

Regulations that flatly prohibit conversion of agricultural land to non-agricultural uses or that are so administratively or procedurally cumbersome that conversion is effectively prohibited can have an adverse affect on the land market and on necessary land use changes. A variety of less restrictive approaches exist for supporting rural land uses and for protecting agricultural land from conversion.

#### **Potential Solutions**

- Allow construction of agriculturally related or residential structures on agricultural land.
- Develop land use planning, zoning, and permitting regulations that reasonably promote the policy of preserving agricultural land and uses without prohibiting non-agricultural use outright. These may include non-exclusive agricultural zoning approaches, creation of transferable development rights, and other measures. A neutral agency should administer land use regulations.
- To the extent that legal prohibitions on converting some agricultural lands to non-agricultural use do exist, do not apply the prohibition or apply more flexible regimes to areas designated as urban, urbanizing, or peri-urban.
- Craft tax regulations that serve to encourage (or at least do not penalize) farmers or agricultural uses.

- Establish districting opportunities whereby members can avail themselves of member benefits in exchange for commitments to keep land under cultivation or otherwise in agricultural use.
- Promote the development of appropriate industry, infrastructure, and social service delivery in agricultural/rural areas as a means of retaining agricultural populations and preserving agricultural uses.
- To the extent that governments are concerned that non-agricultural uses will interfere with agricultural uses, enact "Right-to-Farm" laws. Such laws typically provide that agricultural operations will not be subject to nuisance liability as a result of the non-agricultural conditions in or around the agricultural use if the agricultural operation has been in existence for some reasonable time (such as one year).
- Adopt regulations that require permission from local government to establish and operate agricultural enterprises that are likely to be a nuisance. The process should require notice and public hearings. Once the agricultural use has obtained a permit, its operation cannot be contested.

## V. General Concepts to be Considered and Included in Land Use Planning Laws

The following concepts should be considered during the process of drafting land use planning laws, and many of the following general principles should be reflected within the laws.<sup>91</sup>

1. *Administrative levels of land use planning.* The land use planning law should define the administrative levels at which planning will be conducted. In the United States and Western Europe most detailed land use planning and regulation is done at municipal or county levels. Local efforts tend to better reflect the community issues and needs. The land use plans and the administrative process can better reflect local characteristics and desires. Some regional and centralized (national) planning may, however, be desirable to provide a broad, general framework for developing local plans.
2. *Composition of planning bodies.* The land use planning law should clearly define the composition of each planning body so that members of the community understand the institution and its culture. Opportunities for citizen involvement with the planning body should be provided.
3. *Authority and responsibilities of planning bodies.* The land use planning law should clearly define the authority and responsibilities of each planning body (local, regional, and national) to avoid duplication of effort, conflicts, and confusion.

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<sup>91</sup> See Robert Mitchell & Bradley Rorem, *Land Use Planning Concepts*, (Memorandum to Tatiana Afanasyeva, on file with the Rural Development Institute, Nov. 1, 1994).

4. *Procedures for adopting, modifying, and administering plans.* The land use planning law should clearly identify the procedures for adopting, modifying, and administering any land use plans; this is the first step toward ensuring adequate landowner participation.
5. *Relationships among planning levels.* The law should clearly define relationships among national, regional, and local planning functions. Relationships between different planning functions at the same level should also be defined.
6. *Public participation in planning process.* The extent of public input into and communication about the planning process should be defined and processes should be established for obtaining and using the input. An opportunity for extensive public input into local and regional planning is required in the United States and Western Europe. Input to national planning processes is typically directed through elected officials. Public communication about planning and plans is extensive at all planning levels. Extensive communication with the public about planning helps to prevent "insider" use of planning information and related corruption.
7. *Nature and discretion of administering entity.* The law should define the nature of the administering entity (as distinct from the planning body) and establish levels of discretion. If the administering body lacks discretion as to granting development rights, the process is primarily self-administering. That is, landowners can develop property in any way that is consistent with the plan. Increased levels of discretion can lead to a greater administrative burden, slower approvals, and corruption.
8. *Environmental regulations.* The law should recognize and/or determine the related environmental regulations that will be imposed on the development process. This effort frequently occurs at the national level, while monitoring and enforcement are delegated to regional and local governments. All levels of government should be aware of and balance the costs created for both government and developers by environmental regulations and the external costs created by unregulated pollution and resource consumption.
9. *Use purpose controls.* As a part of the detailed comprehensive planning process, the land use planning law should establish use purpose controls. Zoning codes are the primary method for this process. Non-exclusive zoning approaches to agricultural uses are preferable.
10. *Density controls.* In light of existing and proposed infrastructure, density controls must be established. These controls should permit landowners to maximize use of the property within the established use strictures.
11. *Public infrastructure planning.* Land use plans should include infrastructure (roads, sewer, water, schools, parks, and other public support functions) planning.
12. *Protection of historical and cultural treasures.* Land use planning laws should protect historic districts and landmarks in a way that preserves cultural treasures but does not unnecessarily stifle appropriate development.

13. *Pre-existing uses.* When land use laws or regulations impose new land use standards, the law should appropriately protect pre-existing uses which are inconsistent with the new standards while providing for the opportunity and freedom to undertake appropriate development.
14. *Vesting of development rights.* Land use planning laws and approval processes should provide for vesting and protection of the right to develop property pursuant to a current plan. Vesting might occur at the time the construction permit is issued or when the development application is submitted.
15. *Modifying land use plans.* Land use planning regulations must establish frequencies and principled procedures for modifying local plans (subject to public participation). *Ad hoc* modifications on the part of local officials should be prohibited.
16. *Departing from local plan.* To the extent consistent with the considerations under point seven as applied to the particular country setting, the law should grant some flexibility to the administering body allowing it to depart from local plan. Such departure should be allowed only in certain defined circumstances, be implemented pursuant to clear guidelines, and follow specific procedural rules. Variances from the local plan should only be granted pursuant to a clearly defined and objective application and approval process.

## Chapter 7

# Land Transactions

by Leonard Rolfes, Jr.

### I. Introduction

This chapter discusses restrictions in ECA countries on the ability of private parties to buy, sell, lease, pass by gift, bequeath and otherwise transfer rights to land, along with how such restrictions are addressed in developed market economies.<sup>1</sup> Private control over decisions to transfer land rights is indispensable to the effective functioning of a land market. This control places the power over allocation in the hands of those most knowledgeable about the land, and with the most vested interests in effective allocation of that land.

### II. Legal Issues Relating to Land Transactions in ECA Countries

#### A. Prohibition of Land Sales

Laws in some ECA countries fail to authorize, or affirmatively prohibit, sales of privately-owned agricultural land. In Ukraine the Land Code provides for private ownership of agricultural land, but does not authorize the right to buy and sell such land.<sup>2</sup> In Russia the draft Land Code adopted by the Federal Assembly in the summer of 1997 (and subsequently vetoed by President Yeltsin) effectively prohibits agricultural land sales.<sup>3</sup>

In addition, land sales are prohibited in ECA countries through allocation of long-term use rights to land which do not include the right to sell. For example, in Belarus, Uzbekistan, and Russia, long-term use rights to agricultural land have often been allocated in "permanent use" or "lifetime inheritable possession." These forms of tenure, by their definitions, do not allow transfer by sale. **Chapter 3, *Land Privatization***, discusses permanent use and lifetime inheritable possession in detail.

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<sup>1</sup> This chapter does not address mortgage transactions; they are addressed in Chapter 8, *Mortgage*.

<sup>2</sup> LAND CODE OF UKRAINE art. 3 (March 13, 1992). Decree of the President of Ukraine "On Urgent Measures to Accelerate Land Reform in the Sphere of Agricultural Production" (November 10, 1994) establishes that agricultural land shares may be bought and sold, but nothing is said about agricultural land itself.

<sup>3</sup> Draft Land Code of the Russian Federation, arts. 83, 87 (1997).

Prohibition of land sales is the most direct and onerous of the impediments to land transactions existing in ECA countries. Simply put, if land legally cannot be sold, then private transfers to improve the effectiveness of land allocation and use cannot happen. Policy justifications for use of this onerous provision, such as thwarting of land speculation, are dwarfed by the potential for harm.

## **B. Moratoria on Land Sales**

Moratoria on private land sales for set time periods are found in the laws of some ECA countries. On the whole moratoria are an impediment to the rapid development of a land market. In some cases, however, moratoria are used to address legitimate policy goals, though it is questionable whether moratoria can be successfully enforced to realize those goals.

Initially, broad moratoria on sales are never a good idea; examples exist in ECA countries which recognize this fact. At the beginning of the reform process Bulgarian law prohibited citizens who received land from a state or municipal land fund from transferring that land for a ten year period.<sup>4</sup> The three Baltic countries also initially had five-year moratoria on agricultural land sales.<sup>5</sup> Upon recognizing that such prohibitions were slowing down the reform process, however, these moratoria were lifted.<sup>6</sup> Similarly, the Moldovan constitutional court invalidated a six-year moratorium on sales of agricultural land.<sup>7</sup>

Some ECA governments have placed sales moratoria on government land which has been transferred to private parties free of charge. For example, Bulgarian law provides that agricultural land in certain unproductive or depopulated localities can be transferred to citizens for cultivation, with that ownership (and thus transfer rights) being transferred for free after the citizen has cultivated the land for 10 years.<sup>8</sup> This moratoria seems designed to discourage applicants who are not serious about farming.

A related policy concern behind land sales moratoria for land obtained free from the state is the prevention of what is perceived as quick and unjust profits. Some fear that "land speculators" will obtain land from the state for free or at low prices, then quickly turn around and

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<sup>4</sup> Law of Bulgaria "On the Ownership and Use of Agricultural Land," art. 20(2) (1991) [hereinafter Law on Agricultural Land].

<sup>5</sup> William H. Meyers & Natalija Kazlauskienė, *Land Reform in Estonia, Latvia and Lithuania: A Comparative Analysis*, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE 92 (Stephen K. Wegren, ed., 1998) [hereinafter Land Reform].

<sup>6</sup> *Id.*

<sup>7</sup> Law of Moldova No. 369-XIII "On Modification and Completion of the Land Code," art. V (Feb. 10, 1995) (declared unconstitutional by the Constitutional Court, Oct. 2, 1996). To comply with the Constitutional Court decision, Law No. 1202-XIII (May 29, 1997) amended Law No. 369-XIII.

<sup>8</sup> Law on Agricultural Land, *supra* note 4, art. 26.



sell the land off, thus making an unjust profit. These fears can even apply to land obtained from private parties. This policy seems to be the justification for Article 17 of the Land Code of Ukraine, which prohibits sale of private land for six years after privatization.<sup>9</sup>

However, these policy concerns might be addressed with a more focused remedy, which would not apply to land that was purchased, whether from the government or a private party. The remedy should also not apply to land that was received free from the government, but was transferred to beneficiaries as part of the restitution processes or to workers on former state and collective farms who receive land in other ways, such as through land shares. The rationale for excluding these groups is that they can be perceived to be otherwise entitled to the land. This is clear in the case of restitution, since the land being returned was seized from the recipients to begin with. Moreover, workers on state and collective farms who receive land rights during privatization have "earned" their land rights through service on the farm; their new rights are thus not a windfall, and should be alienable.

Whether such a "focused remedy" should take the form of a moratoria is doubtful. Moratoria are arguably unenforceable; methods such as taxing short-term profits may be more effective.

As a final matter, land could be viewed as an asset to be privatized, just like non-land assets in industrial, retail, or other non-agricultural enterprises. To the extent moratoria are not applied to the sale of these non-land assets, moratoria should not be applied to the sale of land.

### **C. Lack of Procedures and Model Forms for Executing Land Transactions**

In the ECA countries land markets are only beginning to reappear after a 50 year hiatus: in some cases the hiatus was even longer, while in still other cases land markets never significantly developed in the first place. Thus, the experience of many ECA countries with land markets is rudimentary at best, often limited to transactions in small garden plots. Even if a country has legislation in effect outlining the principles of a land market and sanctioning private action, often the citizens are unable to take advantage of new rights due to their unfamiliarity with and lack of confidence in the new system. Part of the problem is due to the absence of: (a) regulatory material which outlines the process for conducting transactions in a usable manner; and (a) model contracts for the different types of transactions.

The Russian experience provides insight into this problem. While Russian legislative and regulatory materials contain procedures and model contracts on sale of small garden-type plots and on lease of agricultural land shares,<sup>10</sup> procedures and model contracts do not exist for

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<sup>9</sup> LAND CODE OF UKRAINE art. 17 (March 13, 1992). See also CSABA CSAKI & ZVI LERMAN, LAND REFORM IN UKRAINE: THE FIRST FIVE YEARS 16 (World Bank Discussion Paper #371, 1997).

<sup>10</sup> Resolution of the Government of the Russian Federation No. 503 "Regulations of Purchase and Sale of Land Plots by Citizens of the Russian Federation" (May 30, 1993) contains a seven-step process for conducting a land purchase-sale transaction, along with a model contract. In addition, Decree of the President of the Russian Federation No. 337 "On Realization of Citizens' Constitutional Rights to Land" (March 7, 1996) ordered the

agricultural land plot transactions (including sale, lease, and gift), nor for agricultural land share transactions other than lease. Research conducted by RDI in rural areas of several Russian provinces over a multi-year period has consistently found that farmers would be better able to carry out transactions, and local officials could better facilitate transactions, if detailed regulations on the process for carrying out transactions existed, along with model contracts.<sup>11</sup> The existence of legally endorsed methods for conducting transactions should provide potential land market participants added confidence in the land market.

It is likely that any ECA country which has not issued procedures and model forms will need to do so to spur the development of a land market. The purpose and basic tenants of each are fairly uniform.

Detailed procedures should serve as a road map for the landowner and transferee to use in carrying out the transaction. The procedures should largely restate what clauses are needed in the contract itself. Additionally, the procedures should contain points of law that the parties would need to be aware of when concluding their agreement. Using the lease of an agricultural land plot or landshare as an example, these would include:

- Identification of the land plot or size of the land share which is the subject of the deal;
- The term limitation of the lease agreement as provided by law, if any;
- The need to register the lease agreement, if any;
- Statement that the rental payments may be made in money or in-kind, and that they may be fixed or variable, as agreed on between the parties;
- Statement of the frequency of the lease payment, as agreed on between the parties;
- Statement as to whether the lessor or lessee is responsible for payment of the land tax. This could be agreed to by the parties, if desired;
- Statement as to early termination for non-performance, and the procedure to be followed; and
- Description of dispute resolution mechanism.<sup>12</sup>

With regard to the model contracts, the contract on purchase-sale of a land plot can serve as an example. The contract would need to include at a minimum:<sup>13</sup>

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government to prepare model agreements on land share leasing. In fulfillment of this directive, the State Committee for Land Resources and Land Management issued two model land share lease agreements along with a 13-step procedure for concluding such agreements. (The Directions on the Procedure for Formalization of Contracts for Transfer of Land Shares Into Lease, Model Agreement on Lease of Land Shares by Multiple Lessors, Model Land Share Lease Agreement, all fall under the cover of N.V. Komov letter # 1-11/1034 of 16.05.96 to provincial land committees entitled "On the form of contracts.") The adoption of these regulatory materials seems to have stimulated the development of a market in small plots and lease of agricultural land shares.

<sup>11</sup> Roy L. Prosterman et al., *Prospects for Family Farming in Russia*, 49 EUROPE-ASIA STUDIES 1390-91 (1997).

<sup>12</sup> See generally provisions "On the Procedure for Formalizing Contracts of Transfer of a Land Share Into Lease" approved by the Saratov Oblast Committee on Land Resources and Land Management (January 23, 1998).

- Identification of the parties to the purchase-sale deal;
- Identification of the land plot (and its location) which is the subject of the purchase-sale deal. This would probably include annexing a map of the plot to the model contract;
- Verification of the seller's right to the land plot which gives him authority to sell the plot;
- Statement regarding when the purchase-sale contract will enter into force. This would generally happen when the contract is registered;
- Statement of the consideration to be paid by the buyer for the land plot (money, or in-kind consideration), and the terms by which it will be paid (immediately, on a monthly basis, etc.);
- Description of any encumbrances (mortgages, liens, etc.) on the seller's interest in the land plot;
- Additional terms or conditions, which must be satisfied before the contract is registered;
- Address and signature lines for the buyer and seller;
- Space for notarization (if required) and registration stamps and signatures; and
- Date of conclusion of the contract.

#### **D. Restrictions on Purchase of Land by Foreigners**

Several ECA countries have restricted the ownership or purchase of land by foreign citizens and legal entities. These issues are comprehensively addressed in **Chapter 2, *Land Ownership***.

#### **E. Restrictions on Land Sales to Ensure Continued Agricultural Use**

Some ECA countries attempt to prevent conversion of agricultural land to non-agricultural use by imposing restrictions on land sales transactions. Such restrictions add a layer of complexity to the transaction process that can hinder the optimum allocation and use of land.

One example of such a restriction can be found in Russia. Russian law contains language suggesting that, as a condition of an agricultural land sales transaction, the land must continue to be used for agriculture.<sup>14</sup> The following difficulties could arise:

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<sup>13</sup> These provisions are derived from the draft "Model Agreement on Purchase-Sale of a Land Plot," prepared by the Rural Development Institute (April 1997).

<sup>14</sup> Decree of the President of the Russian Federation No. 1767 "On Regulation of Land Relations and Development of Agrarian Reform in Russia," sec. 5 (October 27, 1993); Recommendations "On the Procedure for Disposal of Land and Property Shares," sec. 9, *approved by* Resolution of the Government of the Russian Federation No. 96 "On the Procedure for Exercising the Rights of Owners of Land and Property Shares" (February 1, 1995).

- The state may have to participate in the process of negotiating the deal, rather than functioning solely as the registration authority. This would add a layer of complexity to the transaction process;
- The seller of the land plot could be required to enforce the condition. The seller, however, would have little ability or desire to do so; his overriding interest is in selling the land and receiving his money;
- If the buyer does change the use purpose in violation of the purchase-sale agreement, the violation could lead to the contract being voided, giving rise to registration and other problems; and
- The possibility of a residual seller's right to void the contract (in effect a private encumbrance) may discourage mortgage lending upon the security of the agricultural land, and depress land prices.

Concerns about protecting land for agricultural use are best addressed through rules on zoning and land use. See the discussion in **Chapter 6, *Land Use Regulation***.

A related type of impediment can be found in Moldova, where the law requires that only persons engaged in farming may own agricultural land.<sup>15</sup> This restriction will reduce the number of interested buyers and make land less attractive as an object of mortgage, and so is likely to depress land values.

Another impediment to land sales that has been seen in ECA countries is the requirement that a purchaser of agricultural land must demonstrate either experience or educational background in agriculture. For example, such restrictions were once found Moldovan law.<sup>16</sup> While this type of requirement may be justifiable when land is initially privatized by the state,<sup>17</sup> it is a burdensome impediment to sale of private land among private market participants. The restraint also fails to recognize that buyers of agricultural land have a strong self-interest in producing effectively on the land, since they are assuming all of the financial risk. These buyers are in a better position than the government to decide for themselves if they are capable of farming.

## **F. Land Lease Restrictions**

The most common restriction on land leasing found in ECA countries is a limit on the length of time for which a land plot can be leased. For example, under Ukrainian law a citizen

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<sup>15</sup> Law of the Republic of Moldova No. 1308-XIII "On the Normative Price and Procedure for Sale and Purchase of Land," art. 6(2) (1997).

<sup>16</sup> Phone conversation with Robert Mitchell, RDI staff attorney and project attorney for USAID Project to Develop Land Markets, Chisinau, Moldova (July 9, 1998).

<sup>17</sup> Given the special policies served, such a requirement should not apply to recipients of agricultural land under restitution provisions (many of whom may be city dwellers) or under land share arrangements (some of whom are workers in rural schools, clinics and other social services).

who owns a land plot may lease it out only for up to three years, or for up to five years under special circumstances such as service in the armed forces.<sup>18</sup> In Hungary, agricultural land can only be leased for a maximum term of ten years.<sup>19</sup>

These limits on the length of a lease restrict private decisionmaking, and on that basis impair market development as a general matter. However, in some ECA contexts state-imposed limitations on the length of a land lease may actually support land market development. For example, in several ECA countries agricultural land has been transferred to individuals through a system of landshares. The land continues to be used by former collective and state farms, though the new landshare owners may lease, sell, or transfer their shares to more efficient private farms and other enterprises, or withdraw their shares from the collective's land base to start their own farms. However, if long-term leases to former collective and state farms are concluded by the land share owners (perhaps under pressure or with limited knowledge of potential value), the land shares would be unavailable for transfer to more efficient farming units as opportunities appear. Any chance of breaking up the former collective and state farms, which are inefficient and unproductive farming units by any measure, would therefore be lost. Thus, limiting leases to former collective and state farms to short terms may be necessary, though it may be politically acceptable only if all leases are (initially at least) limited to short terms.

Other types of restrictions establish conditions on when a landowner may lease his land plot. The 1991 Russian Land Code allowed land leasing only if the owner was incapacitated, serving in the military, or in school.<sup>20</sup> The Code further limited rent levels to the size of the land tax, which is traditionally very low.<sup>21</sup>

## G. Inheritance

Inheritance of land promises to play a major role in the development of land markets in many ECA countries, as a large percentage of agricultural land is owned by pensioners who will pass their land on as they die. ECA country law generally seems to be free of specific impediments to a landowner bequeathing his land to the beneficiary of his choice or, if the owner dies intestate, having the land pass by law to a spouse, child or other natural beneficiary. Additionally, ECA countries generally treat inheritance of land in the context of civil law as a whole. This too is positive, and can be seen in the laws of Albania<sup>22</sup> and the Czech Republic.<sup>23</sup>

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<sup>18</sup> LAND CODE OF UKRAINE art. 8.

<sup>19</sup> Csaki & Lerman, *supra* note 9, at 235.

<sup>20</sup> LAND CODE OF THE R.S.F.S.R. art. 9 (1990). This article was invalidated by Decree of the President of the Russian Federation No. 2287 "On Bringing the Land Legislation of the Russian Federation into Conformity With the Constitution of the Russian Federation" (December 24, 1993).

<sup>21</sup> *Id.*

<sup>22</sup> Albanian Law on Land, art. 25 (1991).

<sup>23</sup> CIVIL CODE OF THE CZECH REPUBLIC part VII.

Inheritance taxes may also affect the land market, as discussed in **Chapter 10, Land Taxation**. Issues of women and inheritance are addressed in **Chapter 12, Women and Land**.

#### **H. Priority Rights to Purchase Land Parcels**

Some ECA countries give special categories of people a priority right to buy agricultural land if the land is offered for sale. This right is presumably exercised by meeting the terms offered by a prospective “outside” buyer, although the legislation often leaves this to inference rather than stating it explicitly. Several policy reasons are offered for such priority rights, including promoting the ownership of land by the cultivators of that land, allowing local residents the first chance to acquire land for sale, thwarting land speculation, and keeping farms intact.

Initially, one must distinguish between priority rights given when the government is privatizing land, as opposed to priority rights established by law which apply to the sale of privately-owned land. In the former case the government, as the owner of the land, can legitimately make policy choices about who the beneficiaries of privatization are to be. Setting priority rights in this instance is appropriate, though these rights must be specifically defined.

In the latter case, however, priority rights applying to the sale of private land represent a major infringement on the private landowner’s right to freely contract with whomever he chooses, and further complicates the transaction process. It is priority rights on private land sales that are the focus of this section.

In Bulgaria, the “Law on Ownership and Use of Agricultural Land” provides that, in case of sale of agricultural land, a lengthy list of persons and entities have priority rights to buy the land: spouses and direct relatives; “lateral” relatives; the land lessee or user; owners of neighboring land; and the state and local governments.<sup>24</sup>

Albanian law gives preferential rights to buy agricultural land to (in order of priority): direct line ascendants and direct line descendants; adjacent landowners; ex-owners; and other inhabitants of the village.<sup>25</sup> Only after these categories of preferential buyers have had an opportunity to exercise their priority rights may someone else successfully buy the land.

The Ukrainian Land Code gives agricultural land lessees the preferential right to acquire land they lease into ownership.<sup>26</sup>

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<sup>24</sup> Law on Agricultural Land, *supra* note 4, art. 9.

<sup>25</sup> Law of Albania No. 7983 “On Buying and Selling Agricultural Land, Meadows and Pastures,” art. 6 (1995).

<sup>26</sup> LAND CODE OF UKRAINE art. 8.

In Russia, the Civil Code and specific agricultural reform legislation provide that, in the event an agricultural land share owner wants to sell his share of the commonly-owned land, the co-owners of the land have a preferential right to buy the share at the price offered, all other conditions being equal.<sup>27</sup>

In each of these cases, the procedures for exercising priority rights have not been specified in any detail. As a result, the validity of any sales of land subject to these priority rights is uncertain. Even if the procedures had been specified in detail, they would likely have been complex (by necessity), thus increasing the difficulty and expense of carrying out a transaction.<sup>28</sup> In other words, whether or not sufficient procedures for exercising a priority right have been established, the priority right will remain a significant impediment to land sales.

As a final matter, a potential non-priority buyer of a land parcel may have to expend significant resources to gather the information needed to locate a parcel suitable for his needs. If this potential buyer knows that any offer he makes can simply be matched by a priority buyer, the potential buyer may be discouraged from expending the resources to gather the information in the first place. Thus, the universe of potential buyers would be reduced, leading to continuing low prices for land as well as the land not being used in its highest and best manner.

### **I. High Taxes on Profits From Early Land Sales**

Some ECA countries wish to discourage sales of land acquired a short time before the prospective sale. Moldova and Hungary provide examples. In Moldova, any sale of agricultural land within five years of purchase is subject to a state fee in the amount of 10 times the customary tax levied on land sales, with limited exceptions.<sup>29</sup> In Hungary, the law provides that "if land received as compensation is sold within three years from time of possession, the seller is required to pay income tax on the entire sales revenue."<sup>30</sup>

Policy grounds cited in support of high profits taxes include the thwarting of land speculation and the discouragement of quick profits by privatization beneficiaries. However,

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<sup>27</sup> CIVIL CODE OF THE RUSSIAN FEDERATION art. 250 (1994) (Russian Federation); RF Decree No. 1767, *supra* note 14, sec. 5.

<sup>28</sup> A number of issues should, ideally, be addressed in any procedures for exercise of priority rights: how explicit and firm an outside offer must be to trigger the exercise of the priority right; whether holders of such rights must be offered all the same terms and conditions as an outside offeror; what the timing and notice requirements are to priority rightholders and how quickly they must respond; if there is more than one group of such rightholders, whether there must be sequential notices and opportunities to respond; what happens if the original offeror withdraws (or increases) his offer, etc.

<sup>29</sup> Law of the Republic of Moldova No. 1308-XIII "On the Normative Price and Procedure for Sale and Purchase of Land," art. 6(6)" (1997).

<sup>30</sup> Csaki & Lerman, *supra* note 9, at 256.

such taxes, which obviously act “as a deterrent to land sales,”<sup>31</sup> also discourage less productive landowners from selling their land to more motivated and efficient users. While using high profits taxes as an instrument of policy may still be warranted in certain situations, ECA countries considering using such taxes must also factor in negative impact they have on land market development.

## **J. High Transfer Taxes**

Taxation on the transfer of land represents an assessment on the total land sales price, as distinct from an assessment on just the portion of the land sales price which represents a profit. High transfer taxes impose an impediment to land transfers, in that prospective sellers of land may decide not to sell the land because they do not want to pay the transfer tax. Additionally, high transfer taxes can result in under-declared prices which destroy the best evidence of market value necessary to establish a market-based land tax, and create inequities for taxpayers who do declare accurate sales prices.<sup>32</sup>

Several Central and East European countries impose high transfer taxes, known as stamp taxes, on transfers of land and buildings. These countries include Croatia (5%), the Czech Republic (5%), Hungary (2-8%), Kazakhstan (10%), Poland (5%), Romania (7-16%), Serbia (3%), Slovakia (1-4%), and Slovenia (2%).<sup>33</sup> Stamp tax rates greater than 5% are high in comparison to those charged by countries with developed, market-based land taxation systems. These are discussed in Section 3(1) of this chapter.

## **K. Lease Rates of Government Owned Land**

ECA governments continue to own large amounts of agricultural land, and wish to see this land remain under cultivation. Much of this land is leased to private individuals or larger enterprises at a nominal cost. In Russia, agricultural producers who lease land held in state-owned land distribution funds pay a rent amount equal to the land tax, which is very low.<sup>34</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> Vincent Renard, *Property Taxation and Land Policy in France*, 11 PROPERTY TAX JOURNAL 149 (1992) (France’s high transfer tax on land arguably disturbs optimum market costs by raising transaction costs); Anders Müller, *Agricultural Land Tax and the Transition to a Market Economy*, in AGRICULTURAL LANDOWNERSHIP IN TRANSITION ECONOMIES 60 (Gene Wunderlich ed., 1995). (The best way for a transitional economy to tax land is through a combination of: (1) an annual tax based on 1-3% of the market value; (2) a low transfer tax (1-2% of the market value); and (3) moderate capital gains taxes.)

<sup>33</sup> Rebecca S. Rudnick, *Taxing Foreign Investment in Real Property*, 13 BOSTON UNIVERSITY JOURNAL OF INTERNATIONAL LAW 395, 410 (1995).

<sup>34</sup> For example, in Vladimir Oblast the land tax rate varied by local district, ranging from 3,092 old rubles (about 51 cents) per hectare of arable land to 4,518 old rubles (about 75 cents) per hectare. Aleksey Pulin, Memorandum to Rural Development Institute from the Center for Land Reform Support of Vladimir Oblast re: Tax Study 6 (December 5, 1996) (on file with the Rural Development Institute).



While the intention of a nominal lease payment may be good, to keep land in production, strong arguments can be made that nominal payments inhibit the development of the private lease market. Why would a farmer lease land from a private owner if he can get similar land practically for free from a state land fund? Moreover, the lease of land at nominal rates continues to foster the perception that land is not an agricultural production input that must be paid for, just as inputs such as fuel and fertilizer must be paid for. Treating land as a valuable production input, as a land market does, would greatly facilitate more productive and efficient use of the land.

#### L. Maximum Size Restrictions

Rules that establish a maximum landholding ceiling can be overly restrictive and limit transactions in the land market. The justification given for maximum landholding restrictions is to prevent land speculation and to forestall the formation of Latin American style *latifundia*. While ECA countries have not been adopting maximum size restrictions recently, the issue is still under discussion in several countries.

Examples of maximum size restrictions can be seen in ECA countries during the reform process. For example, early land reform law in Bulgaria (1991) limited single households to owning 30 hectares of land in the flat, grain-cropping area of Dobrudja, and 20 hectares elsewhere.<sup>35</sup> In 1992, the law was amended to apply the restriction only for a transitional period of two years after legal restoration of property rights.<sup>36</sup> Such a restriction, if fixed only for a limited time period at the start of a land reform process, is not overly intrusive.

In the Kyrgyz Republic, early reform legislation had set a ceiling for arable land holdings at 20 hectares for intensive agriculture, 25 hectares for less intensive agriculture, and 30 hectares for mountainous areas.<sup>37</sup> This limit was abolished in November 1995 by presidential decree.<sup>38</sup>

In contrast, Russia has had no maximum size limitations in force, yet various drafts of Russia's Land Code propose to give the individual regions the power to set maximum landholding limits. Interestingly, such limits are usually proposed to apply to individuals and private farms, but not to legal entities, i.e., the former state and collective farms. One must wonder whether the advocates of landholding maxima in Russia want to forestall *latifundia*

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<sup>35</sup> Keith S. Howe, *Politics, Equity, and Efficiency, Objectives and Outcomes in Bulgarian Land Reform*, in *Land Reform*, *supra* note 5, at 214-15.

<sup>36</sup> *Id.*

<sup>37</sup> Decree of the President of the Kyrgyz Republic No. 23 "On Measures to Enhance (Deepen) Land and Agrarian Reform in the Kyrgyz Republic" (February 22, 1994).

<sup>38</sup> Decree of the President of the Kyrgyz Republic "On Measures for Further Development and State Support of Land and Agrarian Reform in the Kyrgyz Republic" (November 3, 1995).

development, since it is much more likely that the former collectives, which already cultivate huge land areas, will form *latifundia* than will individuals or private farms.

### **M. Minimum Landholding Size Requirements**

As with maximum size restrictions, rules that establish a minimum landholding floor can also be overly restrictive and limit land transactions. Usually these rules are intended to prevent fragmentation of agricultural land into units too small to be economically viable.

Some ECA countries have adopted minimum landholding levels that do not enable families to establish single-family farms. In the Kyrgyz Republic, for example, the minimum landholding requirement of five hectares of arable land is often larger than one family's land share. A family, therefore, cannot choose to farm independently, but rather must farm cooperatively with other families.<sup>39</sup> In a related, but much more egregious provision, Moldovan law at one point required that those who wished to claim land shares in-kind and leave a collective farm, had to have enough land shares to amount to a so-called "minimum rotation area." The practical effect was that an average of about 60 land share holders had to leave together. The Moldovan Constitutional Court declared this provision unconstitutional in April 1996.<sup>40</sup>

In Russia, the Civil Code does not allow a member of a private farm who wants to leave that farm to withdraw land in kind. This provision is intended to prevent the formation of farms that are too small, but makes it difficult for members to leave farms that are not efficient or productive.<sup>41</sup>

In general, the law should probably not attempt to override individual land transaction and withdrawal decisions by imposing minimum-size requirements. However, special exceptions may exist, such as when land is being passed through inheritance or succession, where minimum-size requirements may be appropriate.

## **III. Land Transactions in Developed Market Economies**

### **A. Prohibition of Land Sales**

No developed market economies have blanket prohibitions on agricultural land sales. On the contrary, one reason that agricultural productivity is so high is because the market

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<sup>39</sup> Decree of the President of the Kyrgyz Republic "On Measures for Further Development and State Support of Land And Agrarian Reform in the Kyrgyz Republic" (November 3, 1995). This decree reduced still higher minimum-size requirements which had previously been in effect.

<sup>40</sup> UNITED STATES DEPARTMENT OF STATE, MOLDOVA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (Department of State Human Rights Country Reports, February 1997).

<sup>41</sup> CIVIL CODE OF THE RUSSIAN FEDERATION art. 258.

mechanism allows for the transfer of land to more productive users, while at the same time enabling the seller to sell his land for an amount that often allows him to recoup his investment in the land and reap a profit.

## **B. Moratoria on Land Sales**

The use of moratoria to achieve policy goals is rare in developed market economies. The United States in particular has a long-standing and strong common law rule against restraints on alienation attached to transfers of ownership.<sup>42</sup> In addition, German law contains nothing analogous to a moratorium on sale of land, even for land that was recently privatized in Germany's eastern provinces. The French Civil Code contains a strong policy in favor of granting owners the freedom to dispose of their "things," which includes land, as they like.<sup>43</sup>

An older comparative experience which may be noted is the United States Homestead Act of 1862. The Homestead Act gave ownership of public land free of charge to settlers who had lived upon or cultivated the land for five years.<sup>44</sup> Thus, in effect a five-year moratorium existed, since settlers had to prove their commitment to cultivating the land before they received ownership. Restrictions under the Homestead Act are distinguishable, however, from restrictions on sales that apply to people who are already owners of their land. In addition, it is questionable whether the moratoria on land sales was enforceable, or whether it simply drove such sales underground.

One of the primary policy goals behind moratoria in ECA countries is to thwart land speculation. If such a goal must be pursued, alternative mechanisms to implementation exist, most notably taxation of short-term profits (see sections II(I) and III(I) of this chapter) and, to a certain extent, maximum limitations on the amount of land an individual or legal entity can own (see sections II(L) and III(K) of this chapter).

As a final matter, several questions arise concerning restricting sale of recently-privatized land. Should a moratorium be applied if the recipient of ownership is a long-term collective farmer who can, from an equity standpoint, be seen to have "paid for" his land by his work on the collective? Should a moratorium be applied on land that has been privatized at a non-nominal price? Should a moratorium be applied to land being returned to people through the

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<sup>42</sup> See CURTIS J. BERGER & JOAN C. WILLIAMS, *PROPERTY: LAND OWNERSHIP AND USE* 166 (4th ed. 1997); *Mountain Brow Lodge No. 82 v. Toscano*, 257 Cal. App. 2d 22 (1968).

<sup>43</sup> CIVIL CODE OF FRANCE art. 544 (1994).

<sup>44</sup> An Act to Secure Homesteads to Actual Settlers on the Public Domain [The Homestead Act], sess. II, ch. 75, secs. 1-2 (May 20, 1862).

restitution process, which by its nature acknowledges that the land was unjustly taken from these people in the first place?<sup>45</sup> The answer to all these questions is arguably “no.”

### C. Procedures and Model Forms for Land Transactions

Developed market economies have had decades, and often centuries, of experience with private land rights and transactions. Mechanisms and model contracts for carrying out land transactions have often developed over time through practice, and legal enactments help give authority and regularity to these mechanisms.

In Germany, the Civil Code serves as the basis for land transaction mechanisms. The Code provides that transactions in rights to land must occur through agreement between the parties to the transaction, along with full notarization and entry in the land register.<sup>46</sup>

French law also contains some guiding procedures and forms. The Rural Code contains specific procedures and a model form for conclusion of agricultural land leases.<sup>47</sup> Dutch law contains similar materials.<sup>48</sup>

In the United States, land law is largely embodied in the common law as developed through centuries of judicial decisions, initially in England, then later in the courts of the individual states, and secondarily through state legislative action. Regulations on how to carry out transactions do not exist, but procedures are based on law and practice. The same holds true for model contracts, which reflect the law but are developed by private parties in the course of daily commerce.<sup>49</sup> Interestingly, there was an unsuccessful attempt in the United States to persuade the 50 states to enact the Uniform Land Transactions Act, which sought to simplify, clarify, modernize and make uniform the law on land transactions, in much the same way that the Uniform Commercial Code addressed transactions in goods.<sup>50</sup>

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<sup>45</sup> In some ECA settings, the land is not even being formally privatized, since the law recognized that the pre-collectivization owners continued to own the land. These owners were simply forced to allow the collective to use the land.

<sup>46</sup> CIVIL CODE OF GERMANY, secs. 873, 925.

<sup>47</sup> RURAL CODE OF FRANCE art. L-411.

<sup>48</sup> Wim Brussaard, *Agrarian Land Law in the Netherlands*, in *AGRARIAN LAND LAW IN THE WESTERN WORLD* 127 (Margaret Rosso Grossman & Wim Brussaard eds., 1992) [hereinafter *Agrarian Land Law*].

<sup>49</sup> CHARLES DONAHUE, JR. ET AL., *PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 576-77 (3rd. ed. 1993).

<sup>50</sup> See Ronald Benton Brown, *Whatever Happened to the Uniform Land Transactions Act?*, 20 NOVA LAW REVIEW 1018 (1996). The Act was developed by a prestigious private group, the National Conference on Uniform State Laws.

#### D. Restriction on Land Sales to Ensure Continued Agricultural Use

All developed market economies have an interest in their agricultural land resources being used effectively for agricultural production. However, the level of interference in the natural workings of the land market these countries are willing to tolerate varies greatly. In many cases market economy experience is probably not useful in the ECA context.

United States law contains no restrictions on land transactions to ensure continued use of the land for agriculture, nor does it require that the buyer of such land have experience or knowledge of farming. Land use issues are a function of zoning, land use, and sometimes land tax legislation, not transactions law and procedures. The United States experience is probably the best model for ECA countries to follow.

German law does require administrative approval for agricultural land sales, but such approval will be denied only if the prospective sale would result in a land plot of less than one hectare or that is otherwise too small to be viable for agriculture.<sup>51</sup> German law does not require that the transaction procedure contain an assurance that the land will be used for farming, nor that the purchaser of land demonstrate experience or knowledge of farming.<sup>52</sup>

Japanese law contains significant restrictions on agricultural land transactions, generally, the purpose being to protect the system of owner-cultivators. This policy was the stated goal of the 1952 Agricultural Land Law, which perpetuated the results of the post-war land reform.<sup>53</sup> To enforce this policy, the Agricultural Land Law provides that all transactions of agricultural land require government permission, and that any transaction which might lead to landlordism be denied.<sup>54</sup> Municipal agricultural commissions have the power to conduct investigations into whether the person applying to purchase or lease land rights has an "earnest devotion to agriculture."<sup>55</sup> As a result, those not already engaged in farming have a difficult time acquiring agricultural land.

Over-intrusive policies such as those applied through Japanese law should not be transferred to ECA country settings. Government interference in land transactions is currently a persistent problem in ECA countries that needs to be tempered, not encouraged, in order to allow

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<sup>51</sup> German Law on the Administrative Control of the Transfer of Ownership of Agricultural Holdings, v. 28.7.1961 (BGB1. I S.1091), secs. 2, 9.

<sup>52</sup> *Id.*

<sup>53</sup> Isoshi Kajii, *Development of Structural Policy -- Centering Around the Agricultural Land Legislation*, in FOOD AND AGRICULTURAL POLICY RESEARCH CENTER, CHANGES IN JAPAN'S AGRARIAN STRUCTURE 35 (1998) [hereinafter *Changes in Japan's Agrarian Structure*]. Some of the restrictions contained in the 1952 Agricultural Land Law were subsequently repealed.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (quoting the Agricultural Land Law).

a land market to develop. Moreover, potential participants in the land market are significantly limited by Japanese-style policies; by contrast, ECA countries need to broaden the universe of market participants so that a land market can develop.

French law does not place direct restrictions on sales of land to ensure continued use for agriculture, but does require that the actual user have agricultural education or experience.<sup>56</sup> Thus, a non-farmer can buy agricultural land without permission, but must lease the land to a qualified tenant. However, given the steady reduction of interest in the farming profession, these restrictions seem to be applied with increasing flexibility.<sup>57</sup> If such education or experience is applied in ECA countries, it should be done so with a great deal of flexibility, as in France.

#### **E. Land Lease Restrictions**

Land lease, including the regulation of relations between landlords and tenants, is probably the most heavily regulated type of land transaction in developed market economies. With regard to tenants in particular, laws in market economies are often based on the policy assumption that tenants have less power than landlords, thus needs special legal protection. Much of the law favors the tenant. However, in many ECA countries the reverse is often true: tenants are large agricultural enterprises whose directors are often powerful local figures, while “landlords” (lessors) are members or pensioners of such enterprises who have far less power than the directors. Thus, if lessons from market economy lease law are to be applied to ECA countries with an eye to the policies they actually represent (protect the powerless from the powerful), the resulting rules might well be ones giving the lessor special protection.

French law relating to agricultural land lease heavily favors the tenant.<sup>58</sup> The Landlord and Tenant Act of 1946 provides a minimum term for agricultural land leases of nine years with right of renewal; if the lease has no time period or a period of less than nine years, the law deems it to be for nine years.<sup>59</sup> The Act also provides for the lease amount to be set according to administrative regulation; the amount is generally far below market rates.<sup>60</sup> These rules do not seem appropriate for ECA countries, where much farming remains collectivized, where there is no indication of exorbitant rents being paid, and where tenants (usually large enterprises) generally do not need special protection. If anything, the underlying policies suggest the reverse rules for the ECA: limit the length of the lease term until the land (or landshare) owner has more options, and either require that rents cannot fall below a stated percentage of the land's

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<sup>56</sup> Louis Lorvellec, *Agrarian Law in France*, in *Agrarian Land Law*, *supra* note 48, at 64.

<sup>57</sup> See Isabelle Couturier, *Rural Land Law in France* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>58</sup> Lorvellec, *supra* note 56, at 54.

<sup>59</sup> RURAL CODE OF FRANCE art. L411-5.

<sup>60</sup> Lorvellec, *supra* note 56, at 54; see also Couturier, *supra* note 57, at 64.

production, or give the lessor a right to terminate after each crop year a lease on which the rents are below that level.

Japan's Agricultural Land Law also includes several provisions providing strong protections to tenants. These provisions include setting the maximum amount of rent, a tenant's legal right to renewal of the lease contract, and priority rights of tenants to the rented lands.<sup>61</sup> The result is that tenants in Japan have a "strong and semi-permanent right to cultivat[e] the rented land."<sup>62</sup>

By contrast, United States law and practice allows agricultural landlords and tenants the freedom to decide among themselves the details of a lease contract. Rent levels are mutually agreed upon and renewal of lease contracts must be agreed to by both landlord and tenant, instead of the tenant having the legal right to automatic renewal. Generally in the United States (with some exceptions, such as small sharecroppers in areas of intensive farming) landlords and tenants are thought to have roughly equal bargaining positions.

In Italy, land lease legislation contains protections for tenants to preserve the post-war reforms that were undertaken. Notably, rent is fixed to certain "equitable" benchmarks, and agricultural leases may only be concluded for a term of at least 15 years.<sup>63</sup>

In Germany, the 1985 Law on the Administrative Control of Leasing Contracts contains reporting requirements for agricultural leases.<sup>64</sup> Agricultural landlords must "report the conclusion and each modification of a leasing contract to the competent authority."<sup>65</sup> However, the authority may order the landlord and tenant to modify or cancel the lease only for a handful of rare and rather peripheral reasons, the most important of them being land fragmentation.<sup>66</sup>

In the Netherlands, the Agricultural Lease Act provides administrative bodies known as land control boards the power to approve, change, or nullify lease contracts.<sup>67</sup> Additionally, the Act provides that an agricultural lease contract shall be for a minimum of six years for land

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<sup>61</sup> Changes in Japan's Agrarian Structure, *supra* note 53, at 37.

<sup>62</sup> *Id.*

<sup>63</sup> Paola Porru, *Agrarian Land Law in Italy*, in *Agrarian Land Law*, *supra* note 48, at 113.

<sup>64</sup> German Law on the Administrative Control of Leasing Contracts (1985), as cited in Christian Grimm, *Rural Land Law in Germany* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>65</sup> Wolfgang Winkler, *The Law of Agricultural Land Use in the Federal Republic of Germany*, in *Agrarian Land Law*, *supra* note 48, at 82.

<sup>66</sup> *Id.* at 81-82.

<sup>67</sup> Brussaard, *supra* note 48, at 128.

without farm buildings, and 12 years for land with farm buildings. Contracts for a shorter period are allowed only under exceptional cases, and only upon approval of the Land Control Board.<sup>68</sup>

Finally, in Norway the 1965 Act of Tenancy provides for freedom of contract between parties of farmland leases of up to 12 years; leases for longer periods must be approved by local authorities.<sup>69</sup>

## F. Inheritance

Some countries with developed market economies share a concern for preserving farmland as a functional economic unit when the farmer dies and his estate is to be transferred to his heirs. While the German Civil Code contains that country's primary law of inheritance,<sup>70</sup> some German provinces have specific laws on inheritance of farms. The most important law of this type, the *Nordwestdeutsche Höfeordnung*, covers the provinces of Hamburg, Lower Saxony, Nordrhein-Westfalia and Schleswig-Holstein.<sup>71</sup> As an initial matter, the owner of a farm decides whether the succession of his farm will be carried out under the provisions of the *Höfeordnung*, or under the usual provisions of the Civil Code.<sup>72</sup> If the *Höfeordnung* is used, the farm passes to only one of the heirs, with any joint heirs being entitled to receive compensation, but at a reduced amount to ensure the farm's continued existence and operation.<sup>73</sup> Thus, the state gives the farmer a mechanism to preserve the farm, but the farmer decides whether to use the mechanism.

Japanese inheritance law does not make special provision for agricultural land inheritance directly. However, under the Agricultural Land Act, those who receive agricultural land through inheritance who do not intend to cultivate the land must sell it or risk government expropriation.<sup>74</sup> This policy does not seem appropriate in ECA country settings, where the land market is nascent and the state has a long history of being too intrusive in the land area.

In the United States agricultural land inheritance is governed by the general inheritance laws of each state. Specific provisions to prevent dissolution of farmsteads or to require that the land be owned by its operator do not exist.

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<sup>68</sup> *Id.*

<sup>69</sup> Torgeir Austenå, *Agrarian Land Law in Norway*, in *Agrarian Land Law*, *supra* note 48, at 143.

<sup>70</sup> CIVIL CODE OF GERMANY secs. 1922-2385.

<sup>71</sup> *Nordwestdeutsche Höfeordnung* [Northwest Germany Farm Rules].

<sup>72</sup> See Grimm, *supra* note 64.

<sup>73</sup> *Id.* at 9.

<sup>74</sup> Agricultural Land Act, arts. 6 & 9, as cited in Isoshi Kajii, *Rural Land Law In Japan* (May 1998) (unpublished manuscript on file with Rural Development Institute).



For a discussion of inheritance tax laws applying to agricultural land, see **Chapter 10, Land Taxation.**

### **G. Priority Rights to Acquire Land Parcels**

Most countries with developed agricultural land markets place few restrictions on the choice of transferees in a land transaction. The rules that do exist appear to be established for farmland protection or more specifically, as in the case of the French law, protection of the interests of farmer-lessees likely to have significantly less bargaining power than their lessors.

A German court ruling on the Grundstückverkehrsgesetz provides for the possibility that a farmer may have a priority right over a non-farmer to purchase a piece of land, "if [the] farmer needed the land to increase the size of his farm and was willing to pay the price stipulated between the owner and the non-farmer."<sup>75</sup>

French law clearly provides that, when an owner seeks to transfer his land (with limited exceptions), a tenant who has cultivated the land for at least three years has a priority right to acquire the land. The owner must give the tenant two months to decide whether to acquire the land.<sup>76</sup> As discussed earlier in this chapter, in ECA countries lessees are often large former state and collective farms that do not need legislative assistance in acquiring land.

In contrast, United States law does not provide for any particular group to have priority in the acquisition of a land parcel upon transfer. There are no legislated "rights of first refusal," which would give a previous owner, user of the land, or other interested party the ultimate right to intervene in a deal with another a potential buyer.

### **H. High Taxes on Profits From Early Land Sales**

The laws of many countries tax capital gains from the sale of land and other assets. Some of these laws apply somewhat higher tax rates to assets held for short time periods. These laws generally apply to all assets uniformly, as opposed to applying only to agricultural land in particular, as can be seen in the ECA environment.

In Japan, the standard national capital gains tax rate is 30%. In addition, both prefectural and municipal capital gains taxes (3% and 6% respectively) apply to earnings from land transactions. However, higher taxes (40% national, 4% prefectural, 8% municipal) apply to capital gains from sale of assets held for less than 10 years. Thus, the overall tax rate on profits is 39% if the asset has been held for 10 years or more, and 52% if the holding period is under 10 years.

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<sup>75</sup> Winkler, *supra* note 65, at 81-82.

<sup>76</sup> RURAL CODE OF FRANCE arts. 412-5 - 412-13.

Capital gains from the sale of agricultural land in Japan may be subject to one of several exceptions to the general rules.<sup>77</sup> First, there is a general exclusion of 500,000 yen for profits on the sale of any asset. Second, there is a special exclusion for land sold as part of a program for promoting holding of agricultural land. If such land has been held for the long-term capital gains period, then the seller is taxed on the lesser of 8 million yen or the actual capital gain. If the seller held the land for less than the long-term holding period, the seller is allowed to exclude 8 million yen from the amount taxed as short-term capital gain. Third, there is a special exclusion of 30 million yen for residential land sold by the owner-resident.

German law subjects profits from land sales to income tax but exempts profits which are re-invested into agriculture within a given period of time.<sup>78</sup> Higher taxes are not imposed if the land is held for a short term.

Under French law, if a capital gain has been accrued after more than two years of owning an asset, there is a reduction in the tax rate per subsequent year of ownership. Sale of property held for longer than 22 years is exempt.<sup>79</sup>

In the United States, income from agricultural land sales is often subject to both state and federal capital gains taxes, and early sales are not subjected to a higher tax rate. In fact, some states actually grant capital gains tax breaks on sales of farmland and other farm assets. In Wisconsin, for example, a 1998 amendment to the capital gains tax law provides for a complete exclusion for income derived from sale of a farm to a child or other close relative.<sup>80</sup>

While the body of current tax law in developed market economies generally does not include levying higher taxes on short-term turnaround sales, at times developed market economies have used higher tax rates to discourage sales of assets, including land, held for short or medium time periods. For example, the United States in the 1930's and 1940's had a federal tax on profits from sale of assets, including land parcels. The tax gradually decreased the longer the land parcel was held, with the minimum tax level reached after 10 years.<sup>81</sup>

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<sup>77</sup> See generally KOICHI NISHIMURA ET AL., *FUDOUSAN-KANKEI-ZEIHOU I KOKOZEI* (REAL ESTATE TAX, VOLUME I, NATIONAL TAXES) 18-20 (1992).

<sup>78</sup> Grimm, *supra* note 64.

<sup>79</sup> Couturier, *supra* note 57.

<sup>80</sup> Wisconsin Statute sec. 71.05(6)(b)(25) (1998); Cate Zeuske, *Gov. Deserves Credit for Easing Taxes on Farms*, CAPITAL TIMES, April 18, 1998, at 7A.

<sup>81</sup> See Revenue Act of 1934, ch. 277, sec. 117(a), 48 Stat. 680, 714 (1934), current version at I.R.C. sec. 1202(a) (supp. V, 1981).

## I. High Transfer Taxes

According to the 1997 revision to German tax law, the real estate acquisition tax is now 3.5% of the "Gegenleistung," which is, as a rule, the purchase price. The buyer and the seller are jointly tax obligated, so the party to pay the tax must be identified in the notarial purchase agreement. Land acquisitions by persons who are married or directly related to the seller are exempt from this tax.<sup>82</sup>

Two-thirds of the states in the United States exact real estate transfer taxes, which are often levied either as a percentage of the value ranging from 1% to 5%.<sup>83</sup>

Transfer taxes do not normally apply in Japan until agricultural land has been held for more than 10 years.<sup>84</sup>

The Central Government in France imposes a sales tax on buyers of land, payable at the time of the sale. The tax rate is a percentage of market value that varies by property type. The basic rate is 13.8% but agricultural land is subject to a much lower rate (2.6%).<sup>85</sup> The departmental and communal government levels in France levy an additional tax on land sales. The departmental rate is 1.8% and the communal rate, which is added to the departmental rate, may not exceed 1.6%.<sup>86</sup>

In some countries transfer taxes take the form of stamp duties, which are taxes on the instruments of transfer and are collected when land is sold. Stamp duties are often based on a percentage of the sales price or, in some cases, on appraised value if higher. Countries that impose stamp duties include Denmark (1.2%), Australia, Japan, Sweden (1.5% to 3% depending on whether the land is private or public) and the United Kingdom.<sup>87</sup>

As can be seen, practically all developed market economies assess some type of tax on the transfer of land. Despite their near-universal use, these taxes are an impediment to land transactions. The optimum solution to the impediment caused by transfer taxes is simply their elimination.

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<sup>82</sup> Grimm, *supra* note 64.

<sup>83</sup> JOAN YOUNGMAN & JANE MALME, AN INTERNATIONAL SURVEY OF TAXES ON LAND AND BUILDINGS 215 (1994).

<sup>84</sup> Nishimura, *supra* note 77, at 8-20.

<sup>85</sup> Renard, *supra* note 32, at 148.

<sup>86</sup> Youngman & Malme, *supra* note 83, at 130.

<sup>87</sup> *Id.*, at 39, 121, 186.

## J. Lease Rates of Government Owned Land

As shown in Chapter 3, *Land Privatization*, governments in developed market economies largely do not own arable land, and thus, do not impact the market by leasing out such land.

## K. Maximum Size Restrictions

Some developed market economies have had experience with maximum size restrictions. These restrictions were imposed in response to the very real threat of landlordism, as Japan faced after World War II, or as a way to protect small farms. However, currently most developed market economies do not have such restrictions, or are backing away from them.

In Germany, no restrictions exist on the maximum size of landholdings. The same is true in the United States.

In Japan, pre-war agriculture was dominated by small farms of three hectares or less, though a substantial number of farmers were tenants, not owners. Post-World War II land reform gave most of these tenants ownership of the land they cultivated. In addition, farm size was restricted to that which could be cultivated with family labor. As a result of this reform, most landholdings in excess of three hectares were bought out and redistributed.<sup>88</sup> This policy *de facto* established a maximum size, and was bolstered by the 1952 Agricultural Land Law, which subjected agricultural land transactions to government approval, which would be denied if the transaction "was anticipated to cause landlordism."<sup>89</sup> This provision, when combined with a limit of one hectare that a landlord could lease out, effectively established a maximum size for agricultural landholding of around three hectares.<sup>90</sup>

The idea that the landowner should be the sole operator of arable land in Japan has eroded over time. Beginning in 1962, farmers who worked their own land were no longer subject to ceilings on the amount of land they could own. In 1970, maximum landholding ceilings were eliminated.<sup>91</sup>

In France, maximum landholding restrictions have been used to advance a policy of creating and preserving family farms.<sup>92</sup> Such restrictions take a variety of forms. For example, the Societies for Land Management and Rural Establishment (SAFER), non-profit public

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<sup>88</sup> Kajii, *supra* note 53, at 13-15.

<sup>89</sup> *Id.* at 35.

<sup>90</sup> *Id.* at 36-37.

<sup>91</sup> See Kajii, *supra* note 74.

<sup>92</sup> THE RURAL CODE OF FRANCE art. L331-1.

corporations which play a major role in France's agricultural land market,<sup>93</sup> will not approve the expansion of a farm above 4 *SMI*.<sup>94</sup>

In addition, direct limits are placed on incorporated farms. For such farms, the area farmed is divided by the number of landusers who are qualified to farm and are under 60 years of age. Each landuser is permitted a certain amount of land, and the corporation must request authorization to exceed that amount of land.<sup>95</sup>

A direct limit is placed on the amount of land that can be held by a GFA, or Agricultural Land Group. A GFA is a land company which ensures farming of a particular area of land. The GFA generally buys land, and then leases it to someone who will farm the land.<sup>96</sup> The GFA maximum landholding cannot exceed 15 *SMI*.<sup>97</sup>

Finally, in Denmark the Agricultural Holdings Act of 1989 allows farmers to increase the size of their landholdings up to a limit of 125 hectares.<sup>98</sup>

#### **L. Minimum Landholding Size Requirements**

Legal restrictions on the minimum size of landholdings have been promulgated in several developed countries to discourage fragmentation of land into sizes considered too small to be economically viable. However, these restrictions, particularly in Western Europe, can be complicated and quite interventionist.

In Germany, the legislation discourages fragmentation by requiring prior administrative authorization for the transfer of ownership of agricultural holdings.<sup>99</sup> Authorization can be denied if the transferred agricultural plot would be less than one hectare.<sup>100</sup>

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<sup>93</sup> THE RURAL CODE OF FRANCE art. L143-2.

<sup>94</sup> France uses a concept called the *surface minimale d'installation (SMI)*, or minimum settlement acreage, as a basic unit of measurement to implement farm size policy. (Rural Code, art. L312-5; Lorvellec, *supra* note 56, at 64. A national *SMI* of 25 hectares has been set by France's National Structural Committee. Local *SMI*'s are fixed by Department Structural Committees and published locally in the "schema of the departmental director of structures" (SDDS). Local *SMI*'s cannot be less than 30% of the national figure, and, in mountainous or special zones, not less than 50% of the national figure. (The Rural Code of France, art. L312-5) However, local adaptations for specific crops or land uses are possible. For example, the *SMI* for greenhouse cultivated carnations in Nice is 0.5 hectare; the *SMI* for pastures in the Alps is 250 hectares. Lorvellec, *supra* note 58, at 64.

<sup>95</sup> See Kajii, *supra* note 74.

<sup>96</sup> Only four types of companies (insurance companies, capitalization companies, cooperatives in mountainous zones, and Societies for Land Management and Rural Establishment) can be members of a GFA, and membership is limited to 20 years. THE RURAL CODE OF FRANCE art. R-322-2.

<sup>97</sup> *Id.* art. R-322-1.

<sup>98</sup> Helge Wulff, *Agrarian Land Law in Denmark*, in *Agrarian Land Law* 39, *supra* note 48.

German law also contains rules on reparcelling of agricultural land in order to improve production and working conditions.<sup>101</sup> This can include the consolidation of scattered small holdings into holdings considered sufficiently large. Either a local community or the Land Consolidation Office may decide to submit an area of land for reparcelling. The procedure is not always voluntary: it can be imposed on property owners by the Land Consolidation Office.<sup>102</sup> However, land is rarely taken without being replaced with land elsewhere, the taking must be agreed to by the owner, and the owner is compensated.

The Italian Civil Code sets out a private obligation to limit the divisibility of farmland, mandating generally that no land can be parceled out under a minimum size. However, the enacting legislation does not provide specific guidelines or a procedure by which to determine a minimum unit.<sup>103</sup> The legislation simply defines the minimum amount of land as the amount necessary and sufficient for one family to farm using good agrarian techniques.<sup>104</sup> The minimum size requirement has consequently gone unenforced, except in the province of Bolzano. In Bolzano, a minimum size standard for the ancient farming institution called *maso chiuso* ("closed mountain farm"), has been set that requires the farm to be large enough to adequately support five people at a middle annual income.<sup>105</sup>

In Japan, where agricultural landholdings are very small relative to most ECA countries, acquisition of land through purchase or lease is not legally permitted unless the post-acquisition holding is 0.5 hectares or larger (2 hectares or larger in Hokkaido).<sup>106</sup> However, smaller holdings are permitted for cultivation of grass and flowers. In this case, many small holdings are often cultivated together. A holding that had been larger than these established minima, but then falls below these minima due to sale or lease of a portion of the holding may continue to be farmed by the same farmer.

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<sup>99</sup> Winkler, *supra* note 65, at 81; *see also* The German Act on the Administrative Control of the Transfer of Ownership on Agricultural Holdings (July 28, 1961).

<sup>100</sup> Winkler, *supra* note 65, at 85.

<sup>101</sup> Flurbereinigungsgesetz (FlurbG) (law of reparcelling) vom 16.3.1976, BGBl. I S. 546, *as cited in* Grimm, *supra* note 64.

<sup>102</sup> Winkler, *supra* note 65, at 79.

<sup>103</sup> Porru, *supra* note 63, at 109.

<sup>104</sup> CIVIL CODE OF ITALY art. 846.

<sup>105</sup> Danilo Agostini, Rural Land Law in Italy (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>106</sup> *See* Kajii, *supra* note 74.

In France, subject to the priorities and guidelines set by regulatory authorities, formal authorizations are required for certain farmland parcel break ups. For example, an authorization is required when a parcel is broken into parts of less than 2 *SMI* each.<sup>107</sup> This figure can be lowered to 1.5 *SMI* if the average in the *department* justifies such a reduction.

Finally, the United States and Canada do not prohibit transactions that result in fragmentation, nor do they impose a minimum standard for land plot size. This approach seems most appropriate for the ECA setting.

#### **IV. Checklist of Potential Legal Impediments and Solutions**

##### **Potential Impediment: Ownership without right to sell undermines the essence of "ownership" rights.**

Subjecting the conferral of agricultural land "ownership" to a permanent prohibition on the right to sell deprives the new "owner" of any meaningful ownership or ownership-like rights.

##### **Potential Solutions**

- Adopt legal rules that expressly allow the right to buy and sell land, including agricultural land, which is part of the right of ownership in all developed market economies.
- Where lease or use rights are given instead of formal ownership, adopt rules that expressly allow the right to buy and sell these rights.

##### **Potential Impediment: Moratoria on land sales transactions postpone realization of the benefits of a land market.**

Prohibitions on sale of agricultural land for varying periods after acquisition may impede an effective land market from developing.

##### **Potential Solutions**

- Remove legal provisions on moratoria on all transfers or allocations of agricultural land, especially with regard to private transactions.
- Remove legal provisions on moratoria on sales, except for short moratoria on land recently privatized (except no moratoria on land purchased from government, obtained as restitution, or representing land share rights).

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<sup>107</sup> Lorvellec, *supra* note 56, at 64-65.

- Remove legal provisions that require or allow moratoria on all sales, but implement laws which impose a higher tax on profit from sales of land and other assets recently privatized.
- Moratoria, if applied, should be for a shorter time period than those used or considered in ECA countries. Five years is suggested as the maximum time period.

**Potential Impediment: A lack of needed mechanisms for exercise of transaction rights hinders execution of legal rights.**

Failure to adopt and make available procedures and forms needed to exercise transaction rights may prevent a land market from functioning effectively.

**Potential Solution**

- Adopt procedures for carrying out transactions, along with model contracts. (Numerous private-sector model forms available from practice in developed market economies.)

**Potential Impediment: Prohibition on foreign purchase of agricultural land may limit agricultural financing.**

The rights of foreign citizens and legal entities to purchase agricultural land are restricted.

**Potential Solution**

- Allow foreign citizens or entities to acquire use or lease rights to agricultural land or to obtain ownership through a joint venture.

**Potential Impediment: Restrictions on land transactions attempt to ensure continued use for agriculture.**

Agricultural use restrictions that apply to sales transactions may restrict buyers to existing farmers and so impede an agricultural land market by limiting participation.

**Potential Solutions**

- Remove all legal provisions that require or permit agricultural use restrictions in transactions, and address any concerns through zoning and land use law.
- Remove legal requirements that buyers of agricultural land be farmers, thereby expanding the pool of potential buyers.



### **Potential Impediment: Land leasing is restricted.**

Laws that limit the length of time a land plot can be leased for and otherwise restrict an owner's ability to lease her agricultural land may deter the development of both farmland leases and sales markets. Given policy considerations, however, a maximum leasing period could be considered a legitimate restriction in many ECA countries.

### **Potential Solutions**

- Base legal provisions on the underlying policy embraced in the lease restriction laws of many developed market economies, which is to empower the disempowered. In ECA settings the disempowered are generally the lessors, not the lessees.
- Apply the underlying policy by implementing rules for leasing land shares that set short maximum time periods and minimum percentage rents, or the option of early termination by the lessor.
- Eliminate legal restraints on leasing out land plots.

### **Potential Impediment: Priority rights to acquire land parcels complicate land transactions.**

Priority rights, especially if held by a sequence of favored groups, could render any sales extremely difficult.

### **Potential Solutions**

- Adopt rules that eliminate all priority rights to acquire land parcels. A person formerly entitled to a priority right to a parcel could offer the highest price.
- If there are to be priority rights in the laws, restrict them to one defined group, and promulgate workable procedures for the exercise and termination of the rights.

### **Potential Impediment: Financial penalties for early sales may hinder development of an effective market.**

Financial penalties on profits from short-term sales of agricultural land, which may or may not be exacted uniformly on profits from the short-term sales of other assets, may create a disincentive for transfer of land to the most productive user. However, if there is an overriding policy concern to discourage short-term sales a heightened level of taxation on profits from early sales may be preferable to prohibitions, moratoria, and other restrictions on alienation of farmland.

### **Potential Solutions**

- Implement a tax law that provides for staggered rates on land sales profits, so that the rate charged is in inverse proportion to the length of ownership.
- Adopt a capital gains tax law that applies uniformly to profits from sales of all assets including, but not limited to, farmland.
- Whether implementing a specific tax on profits from farmland sales or a capital gains tax that applies uniformly to all assets, consider an exclusion from or reduction in profits tax rates for profit earned on sales of farmland sold to close relatives.

### **Potential Impediment: High transfer taxes may reduce efficient transactions.**

High transfer taxes in transitional economies reduce landowners' mobility and result in the under-declaration of sales prices.

### **Potential Solutions**

- Enact legislation that imposes transfer taxes or stamp duties at a moderate level, somewhere between one and three percent.
- Exempt small transactions, setting the exemption level around the typical value of a household auxiliary plot.
- Ensure that transfer taxes for land are no higher than those imposed on transfers of other assets.

### **Potential Impediment: Nominal lease rates for government owned land may undercut the private lease and sales markets.**

ECA governments continue to hold substantial land, which is rented out at nominal rates. This may depress or even forestall private land market development.

### **Potential Solutions**

- Adopt rules allowing land which is being leased from the government at very low rates to be transferred in ownership to the users free of charge, or for a nominal rate.
- Alternatively, implement rules allowing land to be sold to the highest bidder through a series of auctions, organized so that the land would be presented for privatization over time, rather than being dumped at very low prices.

**Potential Impediment: Maximum size restrictions may favor currently existing large collective farms to the detriment of a new private market in farmland.**

Ceilings on the permitted size of landholdings thwart private transaction choices, and discriminate against private farms to the benefit of inefficient former collective and state farms.

#### **Potential Solutions**

- Avoid maximum size restrictions for land acquired through private transactions.
- If maximum size restrictions are to be established, they should be applied to private farms and legal entities using parallel criteria and should be set far above the average farm size of the region where the land is located.
- Maximum size restrictions may be appropriate in limited situations to reduce the size of cosmetically reorganized collective and state farms. *See Chapter 5, Farm Restructuring.*

**Potential Impediment: Minimum landholding size requirements may prohibit the market from allocating land to its most productive use.**

Minimum landholding size requirements can be overly restrictive and limit economically sound land transactions.

#### **Potential Solutions**

- Set no legal minimum landholding requirement for land acquired through private transactions.
- If minimum size restrictions are to be established, they should be lower than the size of the smallest land share, to permit land share owners to start private farms and should not be targeted at private farms.

## Chapter 8

# Mortgage

by Renée Giovarelli

### I. Introduction

Farmers around the world often require (or at least would benefit from) credit for both short-term and long-term purposes. Farming operations usually involve long periods of negative cash flow (during land preparation, planting, cultivation, and harvest) followed by a peak period of positive cash flow after harvest. Because many farmers do not have the liquid resources to cover costs of consumption and cultivation, the need for short-term credit is ubiquitous. Moreover, establishing or expanding farming operations requires large outlays for capital assets such as land, machinery, livestock, and buildings. These large capital outlays are slow maturing investments that provide returns over a period of years. Unless a farm family has sufficient liquid resources for the investment, it must secure medium-term or long-term credit. Access to credit is often an important determinant of a farmer's performance.

Secure and transferable land rights can have an extremely beneficial effect on a farmer's access to credit because such land rights can be pledged as collateral for loans. Collateral plays an important role in most lending decisions because it has several important and interrelated effects.<sup>1</sup> First, collateral partly or fully shifts the risk of principal loss from the lender to the borrower. Second, collateral creates an incentive for borrowers to avoid intentional default.<sup>2</sup> Third (as a result), the existence of collateral increases the likelihood that a lender will offer credit to a farmer. Fourth, at a given interest rate, the amount of credit is expected to increase as the value of the collateral increases. Finally, for a given amount of credit, the interest rate will be substantially lower when collateral is used.<sup>3</sup>

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<sup>1</sup> While collateral is an important factor in the lending decision, it is not the only factor. Other factors include the amount of the loan, the direct and indirect price (interest rate or tied buying and selling deals), the duration of the loan, borrower-specific information concerning the ability or likelihood of repayment (such as past credit history, reputation, ties to the locality, non-farming income), general information pertaining to large groups of borrowers such as forecasts of product prices, the costs of obtaining relevant information, and the relative administrative costs in proportion to the size of the loan. See GERSHON FEDER ET AL., *LAND POLICIES AND FARM PRODUCTIVITY IN THAILAND* 45 (1988); and John Bruce, *Do Indigenous Tenure Systems Constrain Agricultural Development?* in *LAND IN AFRICAN AGRARIAN SYSTEMS* 44 (Thomas Bassett & Donald Crummey eds., 1993).

<sup>2</sup> Hans Binswanger & Mark Rosenzweig, *Behavioral and Material Determinants of Production Relations in Agriculture*, 22 *JOURNAL OF DEVELOPMENT STUDIES* 510 (October 1985).

<sup>3</sup> Evidence from informal credit markets in Myanmar indicates that customary rates of interest are about two thirds higher when not secured with collateral. ASIAN DEVELOPMENT BANK, *FROM CENTRALLY PLANNED TO MARKET ECONOMIES: THE ASIAN APPROACH*, VOLUME 3, 208 (Pradumna Rana & Naved Hamid eds., 1996).

Land is a preferred form of collateral when land rights are secure and transferable. Lenders prefer collateral that is easy to appropriate in case of default, does not easily lose value due to theft or damage, cannot be concealed, and can continue to benefit the borrower. Land satisfies all these conditions and is plentiful in most rural settings. As a result, land is the most common collateral for agricultural lending in developed countries and many developing countries.

Laws to create mortgagability will not have the positive effects anticipated unless other conditions enabling farmers to take advantage of mortgagability are first satisfied. In addition to secure land tenure and the existence of a rural land market, these conditions include willing lenders; terms farmers find attractive; support services that can help ensure success in agricultural innovation; a political and legal situation that permits foreclosure if necessary; and prices for produce that permit recovery of costs of an investment (or, otherwise stated, the farmer's ability to present a viable business plan to the lender).<sup>4</sup>

## **II. Mortgage Law in ECA Countries**

This section describes a number of the legal characteristics of and requirements for mortgages (mortgagability of land, for example) and the corresponding laws (or absence of laws) in ECA countries.

### **A. Mortgagability of Land**

Although most ECA countries legally allow mortgage of some types of land, there are several reasons why land is generally not used as collateral in ECA countries.<sup>5</sup> First, for land to

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<sup>4</sup> Bruce, *supra* note 1, at 44.

<sup>5</sup> While the following section discusses legal impediments to mortgagability of land, there is also a potentially important non-legal impediment. Borrowers' willingness to offer land as collateral varies and is likely to affect the feasibility of using mortgages in land as a tool for financing agricultural development. Private farmers in five countries were asked if they would use their land as collateral if a lender refused to lend unless land was offered as collateral. A minority of farmers replied in the affirmative in Bulgaria (40.5%), Romania (26.0%), Albania (19.6%), Hungary (16.0%), and Poland (14.4%). The "no" responses ranged from 43% to 70%. WORLD BANK, FARM RESTRUCTURING AND LAND TENURE IN REFORMING SOCIALIST ECONOMIES: A COMPARATIVE ANALYSIS OF EASTERN AND CENTRAL EUROPE (World Bank Discussion Paper No. 268, 1995).

A survey in the Republic of Georgia found that only 15% of farmers supported the idea of allowing the legal right to mortgage land and 45% were outright opposed. No mortgage law existed, and buying and selling land was prohibited at the time of the survey. Moreover, there was a total absence of ongoing borrowing, whether formal or informal, among the survey respondents. Only 17% indicated they would be prepared to mortgage their land, while 56% rejected this option even if there were no other way to obtain credit. Some 40% indicated that it probably would be easier to obtain bank credit if they could offer as security an official title document to the land. WORLD BANK, LAND REFORM AND PRIVATE FARMS IN GEORGIA: 1996 STATUS 30 (EC4NR Agricultural Policy Note No. 6, September 1996).

A similar survey of farmers was conducted in Armenia. The survey found that two-thirds had no opinion as to whether land mortgage would be allowed or prohibited. Yet 60% firmly stated they would not mortgage their land, even if there were no other way to obtain credit, and only 25% were of the opinion that official title documents

serve as collateral, legal rights to land must be both secure and transferable. A lender will not make a mortgage loan to a farmer who does not have a secure expectation of continued possession of the land. If a farmer defaults, lenders want land to be readily transferable, for a price that will satisfy the debt. This confidence in the value of collateral requires not only the legal right to transfer and mortgage land rights, but also the existence of a land market with a reliable demand for land. Legislative reforms that permit mortgaging of land far in advance of the development of the demand side of the land market are likely to have little immediate impact because lenders will not be ready to accept land as collateral until they are convinced of its value as security.

In many ECA countries, although laws permit mortgage of land, banks are reluctant to accept land as collateral because farmers do not have secure land tenure or the legal right to transfer land. While there are no legal limits for buying and selling land in Estonia, 90% of the agricultural land is still state-owned and used on a short-term lease basis by family farms, collectives, and farm enterprises.<sup>6</sup> Moreover, the lack of secure and transferable lease rights is a major impediment to access to credit.<sup>7</sup> Ukrainian law places a 6-year moratorium on the private sale of land from the time the title was initially transferred into ownership.<sup>8</sup> The moratorium on sale prevents the practice of mortgage. Farmers in Ukraine who do receive credit do not use their land or house as collateral. Rather, farmers pledge their crops or their machinery and equipment.<sup>9</sup> In the Baltic States, mortgage lending is constrained by the restriction on land ownership by legal entities, because banks are not able to take ownership of such land during foreclosure proceedings. Moreover, many private farmers do not yet have title to their land, making it unlikely that a bank will accept the land as collateral.<sup>10</sup> A World Bank comparative study on farm restructuring and land tenure reform in Albania, Bulgaria, Czech/Slovak Republics, Hungary, Poland, and Romania found lending for investment in land only in Poland

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that could be offered as collateral would ease the credit difficulties. WORLD BANK, LAND REFORM AND PRIVATE FARMS IN ARMENIA 16 (EC4NR Agriculture Policy Note No. 8, December 1996).

The high incidence of negative attitudes toward mortgage could, of course, be attributable to the impediments and uncertainties found in the countries where they reside. The very process of mitigating or eliminating the impediments could serve to reduce such negative attitudes.

<sup>6</sup> WORLD BANK, ESTONIA AGRICULTURAL AND FORESTRY POLICY UPDATE 9 (EC4NR Agricultural Policy Note No.10, February 26, 1997).

<sup>7</sup> *Id.* appendix 1.

<sup>8</sup> LAND CODE OF UKRAINE art. 17 (March 13,1992). It should be noted that, while Article 17 does not except small plots, a later Cabinet of the Ministers Edict allows transfer of auxiliary plots, garden plots, and dacha plots and does not reference the 6-year moratorium. Cabinet of Ministers Edict of Ukraine "On Privatizing Agricultural Land" (December 26, 1992). See also Timothy Ash, *Land and Agricultural Reform in Ukraine*, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE 70 (Steve Wegren ed., 1998) [hereinafter Land Reform].

<sup>9</sup> *Id.* at note 8 and accompanying text.

<sup>10</sup> William Meyers & Natalija Kazlauskienė, *Land Reform in Estonia, Latvia, and Lithuania, a Comparative Analysis*, in Land Reform, *supra* note 8, at 104-05.

(and to a small extent in Albania). This reflected the greater certainty about land tenure and land values in Poland than in the other countries.<sup>11</sup>

Second, mortgage is legally allowed in principle in some ECA countries, but there are no mortgage regulations or forms.<sup>12</sup> In the Kyrgyz Republic, the "Law on Pledge" allows mortgage of land plots, but provides that mortgages will be governed by the Land Code and other legislation on mortgage relations, which has not yet been adopted.<sup>13</sup> Detailed forms and regulations will be necessary to lead people through a newly created legal process. In countries where land transactions are unfamiliar, regulations and model forms help people understand what issues they need to be aware of to make equitable and effective agreements.

Finally, if mortgage is allowed by law, the law may limit the types of land that may be mortgaged or impose other restrictions. The recently passed Law on Mortgage in Russia forbids mortgage of agricultural land.<sup>14</sup> Ukrainian law permits mortgaging of land shares but requires land share owners to obtain the permission of other land share holders. Transactions in land plots in Ukraine are restricted by the six-year moratorium discussed above. In the Kyrgyz Republic, land share owners may mortgage their land share, but only for the "starting value." Starting value is the minimum value of a land share, which is determined by the village government.<sup>15</sup> Under Uzbek law, landusers who hold their land in lifetime inheritable possession may only pledge their land plot if they purchased it at an auction.<sup>16</sup>

As to mortgage of land shares, even if their mortgage is permitted, a practical question may arise as to whether a bank has confidence that land of average quality and location will be

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<sup>11</sup> WORLD BANK, FARM RESTRUCTURING AND LAND TENURE IN REFORMING SOCIALIST ECONOMIES: A COMPARATIVE ANALYSIS OF EASTERN AND CENTRAL EUROPE 100-01 (World Bank Discussion Paper No. 268, 1995).

<sup>12</sup> This scenario is much more likely in the Former Soviet Union where mortgage is a newer concept. Several of the Eastern Europe countries, for example, allowed mortgage under socialism. See generally CHERYL GRAY, EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE (World Bank Discussion Paper No. 209, 1993).

<sup>13</sup> Law of the Kyrgyz Republic "On Pledge," (May 20, 1997). Land shares were dealt with in a separate decree, Regulation of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Right," adopted by Resolution of the Government of the Kyrgyz Republic No. 632 (August 22, 1994). Land shares are the share of land owned or held by a former member or worker of a reorganized collective or state farm in common with the other members, prior to separate delineation of a member's separate land in kind. See Chapter 5, *Farm Restructuring*, for a discussion of land shares.

<sup>14</sup> Law of the Russian Federation No. 102-FZ "On Mortgage (Pledge of Real Estate)," art. 63 (July 16, 1998).

<sup>15</sup> Regulations of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Right," adopted by Resolution No. 632 (August 22, 1994).

<sup>16</sup> Law of the Republic of Uzbekistan "On Land," art. 17 (October 12, 1995).

allocated if requested. See the discussion as to methods of claiming land shares in kind in **Chapter 5, Farm Restructuring.**

## **B. Purchase Money Mortgages**

A purchase money mortgage is a mortgage in which the land being purchased is used as collateral to finance its purchase.

Example: A landowner contracts to sell his farmland to a buyer for \$10,000. The buyer only has \$2,000 in cash so he obtains a loan for \$8,000 from a bank using the land he is purchasing as collateral for the loan. The buyer uses his cash and the loan money to pay the owner for the farm. The owner transfers the farmland to the buyer, who pays the \$10,000 to him, and the buyer simultaneously executes a mortgage on the farmland to the bank to secure repayment of the \$8,000 loan.

Purchase money mortgages allow potential buyers of land who lack sufficient cash and other collateral to afford land. Such mortgages greatly facilitate transactions in land by expanding the number of land market participants to include persons of more modest financial means.

Reviewed FSU draft laws either do not explicitly allow purchase money mortgages or implicitly forbid such mortgages.<sup>17</sup> Provisions implicitly forbidding purchase money mortgages include: (a) those that provide that to receive a loan using agricultural land as collateral, the loan can only be used to improve agricultural land or for obligations directly related to agricultural production; or (b) mortgages will only be given to those with land already in ownership.

In contrast, Hungary allows purchase money mortgages. The Civil Code provides for the use of real estate<sup>18</sup> as collateral, and in many cases the real estate used is the property being financed.<sup>19</sup>

It seems particularly contradictory that opponents of the right to buy and sell land in some ECA countries argue that agricultural land will thereby become concentrated in the hands of cash-rich urban buyers, and these same opponents then oppose purchase money mortgage (or oppose all mortgage of agricultural land), thereby greatly increasing the likelihood that any prospective buyer must already have sufficient cash and no need to borrow.<sup>20</sup>

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<sup>17</sup> Draft laws in both Russia and the Kyrgyz Republic have had language to this effect.

<sup>18</sup> "Real estate" is an Anglo-American common law term for land and structures on land, which is roughly equivalent to the civil law term "immovable property."

<sup>19</sup> Gray, *supra* note 12, at 71. Gray cites paragraphs 265-69 of the Hungarian Civil Code.

<sup>20</sup> If the prospective buyer lacks sufficient cash and is unable to obtain a mortgage loan, the only remaining option is an installment sale, if the seller is willing and able to accept payment over an extended period of time.



### **C. Rules Regarding Penalties, Fines for Late Payments, or Insurance of Collateral**

Mortgage provisions that are too broad or too restrictive may affect borrower's willingness to use their land as collateral. For example, penalty provisions that are too broad raise the concern that mortgagees may insert in mortgage contracts onerous provisions for "penalties" to accumulate with each day of the mortgagor's default. The penalty provisions in the Russian and Kyrgyz Civil Codes, for example, provide no guidelines or limits as to the amount of penalty that can be charged.<sup>21</sup>

Article 31 of the Russian Law "On Mortgage" provides an example of an overly restrictive provision. Article 31 provides that if the mortgage agreement does not contain any other conditions of insurance of mortgaged property, then the mortgagor shall at his own expense insure mortgaged property against loss or damage in full at least up to the amount of the demand secured by the pledge. Article 35 then provides that if the pledgor fails to insure, the pledgeholder can demand immediate performance of the secured obligation and levy execution. This default provision regarding insurance is excessive because certain risks (e.g., flood risks in certain flood-prone areas or earthquake risks to buildings in an earthquake-prone zone) may not be insurable at any affordable cost. The concern is somewhat mitigated because the mortgagor can contract out of this default provision, but new mortgagors may not be wary enough to do so.

In contrast, the Mortgage Law of the Lithuanian Republic requires buildings and structures to be insured up to the date fixed for discharge of the debt, but exempts the land from the insurance requirement.<sup>22</sup>

### **D. Rules Regarding Notice and an Opportunity to Cure Default**

The mortgagee's rights in the land after the mortgagor's failure to perform are the essence of a land security transaction. These rights distinguish the secured mortgagee from unsecured claimants. If the mortgagor does not properly perform the obligation to repay the principal and interest, the mortgagee may commence foreclosure of mortgage proceedings. However, because foreclosure is a harsh remedy, specific rules regarding notice to the mortgagor and an opportunity to cure the default are necessary. Without such rules, the mortgagor will be unlikely to use her land as collateral.

Legal provisions that provide for acceleration of the principal obligation secured by the mortgage are a further concern. That is, in the case of various defaults by the mortgagor, the entire principal amount becomes immediately due and payable.<sup>23</sup> Many draft laws on mortgage we have reviewed in ECA countries refer to acceleration of the principal obligation due under the

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<sup>21</sup> CIVIL CODE OF THE RUSSIAN FEDERATION arts. 329-33; CIVIL CODE OF THE KYRGYZ REPUBLIC arts. 320-23.

<sup>22</sup> Law of the Republic of Lithuania "On Hypothecation (Mortgage)," arts. 8, 32 (October 6, 1992),

<sup>23</sup> See discussion of insurance immediately above.

mortgage agreement, but do not describe the process for acceleration. Acceleration of the principal obligation is a very powerful remedy for the mortgagee. Specific rules regarding proper notice and a sufficient amount of time to cure the default should be provided if acceleration is offered as a remedy for the mortgagee.

Article 12 of the Mortgage Law of Lithuania provides that if the owner of mortgaged property diminishes the value of the mortgaged property to such an extent that the principal obligation secured by the mortgage may not be able to be fully satisfied, the creditor may sue in court for the owner to discharge the obligation before the fixed date. No rules are provided regarding notice to the owner of the mortgaged property or an opportunity to cure prior to filing a legal claim or once a claim has been filed.<sup>24</sup>

### **E. Transfer of Subject of Mortgage**

Article 37 of the Russian Law "On Mortgage" and drafts of the Kyrgyz Republic Law "On Mortgage" provide that the mortgagor must have the consent of the mortgagee before transferring the subject of mortgage unless otherwise provided in the mortgage agreement. The Uzbek Civil Code also provides that, unless provided otherwise by law or contract, consent of the creditor is required to transfer the subject of mortgage.<sup>25</sup> Requiring such consent will reduce activity in the real estate market and may give the mortgagee too much control over the subject of mortgage.

In contrast, mortgage law in the Czech Republic and Lithuania allow for free transfer of the subject of mortgage. Such freedom to transfer, however, could reduce the willingness of the mortgagee to lend. Under Czech law, if a person acquires a thing (pursuant to a contract) that is encumbered by a pledge, the pledge shall be effective against the acquirer (transferee), if the acquirer knew or should have known about the pledge. The acquirer is liable for the value up to the amount of the acquired item.<sup>26</sup> Thus, the acquirer is not liable for the whole obligation if the obligation secured by the pledge is greater than the item pledged.

Article 5 of the Mortgage Law of Lithuania provides that when the right of ownership to mortgaged property passes to another owner, the mortgage passes with the property. The Lithuanian law allows the person who has acquired the mortgaged property for value to clear the property of the mortgage by offering the creditor an amount less than the debt obligation. If the creditor does not agree to the offer, he must sell the property at a public sale at a starting price of at least one-tenth more than the price offered to him. If the property does not sell, the creditor

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<sup>24</sup> Law of the Republic of Lithuania "On Hypothecation (Mortgage)," (October 6, 1992). In contrast, if the debtor fails to discharge the obligation by the date stated in the contract, the rules as to adequate notice and opportunity to cure the default are clear: the debtor and the owner of the mortgaged property (if different) are notified that the debt must be repaid within two months or the mortgaged property will be sold at auction. *Id.* art. 53. Warnings and notices must be delivered in person, and the recipient must confirm receipt in writing. *Id.* art. 31.

<sup>25</sup> CIVIL CODE OF THE REPUBLIC OF UZBEKISTAN art. 277.

<sup>26</sup> CIVIL CODE OF THE CZECH REPUBLIC sec. 151(d).

must purchase it for the starting price. If the property sells at the public sale, the creditor must reimburse the expenses of selling the property incurred by the person who sought to clear the mortgage.<sup>27</sup> The Lithuanian provision seems likely to introduce uncertainties for a prospective mortgagee considerably greater than would a simple provision allowing transfer to a third party subject to the continuing mortgage.

#### **F. Rights to the Property Upon Foreclosure**

At the same time that the law in ECA countries should provide reasonable protections for the mortgagor, a balance must be struck with the reasonable requirements of the mortgagee. In particular, if too many difficulties surround foreclosure proceedings, potential lenders will be reluctant to make mortgage loans. For example, under central planning, although residential mortgages occurred in some Eastern European countries, eviction was rare because the procedures were difficult and time consuming. In some countries, the state had to find alternative housing for the defaulting mortgagor before foreclosure was permitted.<sup>28</sup>

Article 78 of the Russian Law "On Mortgage" forbids eviction of a mortgagor from a primary residence upon foreclosure and realization of the subject mortgage. There is no time placed on this provision, so presumably a former mortgagor could remain in the residence indefinitely. The exceptions to this rule are good but do not go far enough. The eviction rule does not apply if the mortgage secures a loan used to purchase the residential premises or if before concluding the mortgage agreement, members of the mortgagor's family living with him, and if they moved in the mortgaged residential house or apartment later, then prior to their moving in, gave their notarized consent to leave the mortgaged residential house or apartment in case of foreclosure. Allowing those who move in after the mortgage agreement is signed to determine whether eviction occurs will add serious uncertainty to this exception.

This severe limitation will discourage lenders from making residential loans. Moreover, lenders are unlikely to accept houses as collateral for any loans, including agricultural loans, which may in turn limit access to credit for land purchases.

#### **G. Time Period Between Default and Foreclosure**

Article 350 of the Russian Civil Code and Article 281 of the Uzbek Civil Code allow the court to defer public sale of pledged property for up to one year upon request of the pledgor. While the pledgor is still responsible for any penalties that accrue, such a potential grace period may be too long, and may discourage lenders from making loans that necessitate taking a security interest in the form of a mortgage. Moreover, no specific criteria are listed, leaving the court with absolute discretion. Such a provision will lead to uncertainty on the part of the mortgagee.

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<sup>27</sup> Mortgage Law of Lithuania, *supra* note 22, art. 65.

<sup>28</sup> Gray, *supra* note 12, at 29 & 72. Both Bulgaria and Hungary allowed mortgage lending throughout the socialist period.

The Russian Law "On Mortgage" provides that if the mortgagor is an individual and the land is not used for business activity or the land used as collateral is agricultural land, the court may postpone foreclosure sale of the subject of mortgage for up to one year.

#### **H. Sale of Agricultural Land Upon Foreclosure**

Agricultural land is often treated differently than other land, particularly in relation to mortgage. Both federal and regional draft mortgage laws in Russia have required that in the event of foreclosure, agricultural land will be sold at tender rather than public auction. A tender sale is one in which interested parties must meet certain criteria, and only those who do may bid at a public sale. A tender for agricultural land could impede the sale of agricultural land by establishing unnecessary conditions. For example, if the law requires that the bidder must have a given number of years of agricultural experience, the pool of bidders may be greatly reduced. Moreover, a tender adds a degree of uncertainty to the foreclosure process, making it less likely that a lender will accept agricultural land as collateral.

#### **I. Bank Ownership of Land**

One concern that policymakers in a number of ECA countries have regarding mortgage is that, through foreclosures, banks may acquire ownership of large quantities of land. Without regulations restricting bank ownership of land, banks may be induced to speculate on land and tie up large amounts of capital on land purchases at foreclosure sales. Clear restrictions on bank ownership of land can overcome this obstacle to mortgage.

#### **J. Source of Mortgage Loans**

One idea that surfaced early in Russian debates on land mortgage and that might arise in other ECA settings (but which has now receded in Russia) is that a single, monopoly "Land Bank" established by the government should be responsible for all loans using land as collateral. While there may be a role for a public institution to do mortgage lending, perhaps especially for agricultural loans that may be too risky for commercial lenders, there is no reasonable justification for a monopoly role for such an institution in a market economy.

### **III. Mortgage Law in Developed Market Economies**

#### **A. Mortgagability of Agricultural Land**

The law in all of the developed market economies surveyed allows agricultural land to be used as collateral. In addition, the law in those countries allows and facilitates secure land rights to agricultural land and the transfer of those rights. In the United States, debt secured by agricultural land has played an important role in the development of agriculture. Today, most United States farmers remain ultimately dependent on continued access to credit for their

survival.<sup>29</sup> Adequate amounts of credit are necessary for new farmers to purchase farms and for existing farms to grow and remain competitive. US farmers' ability to borrow money using land as collateral also represents a basic source of operating capital.<sup>30</sup>

German law allows agricultural land to be mortgaged for investment in the operation of the farm or any other purpose. Both private commercial banks and public financial institutions can loan money to farmers on the security of the farmer's land rights.<sup>31</sup> The public banks--called *Landesbanks*--are owned primarily by German municipalities and counties and combine commercial and investment banking functions, although the *Landesbanks'* original role was to be a clearing bank for municipal savings banks and financier for state government. The sponsoring German state agencies guarantee the obligations of *Landesbanks*, and the *Landesbank* lending rates are consequently lower than private banks. *Landesbanks* have been a target of criticism by European Union private banks over the past several years because their public guarantee status is seen as providing an unfair advantage and being an inappropriate use of public funds.<sup>32</sup>

In Italy, public and private financial institutions will lend money to farmers using land as collateral. In general, private commercial banks act as an intermediary between farmers and the state and regional governments. State and regional governments and the European Union provide capital to improve and purchase land and buildings. In the 1970s, the general program (which had previously been a national program)<sup>33</sup> of incentives for land acquisition by family farmers became the responsibility of regional legislatures and administrations.<sup>34</sup> Almost all regions have passed legislation providing authorization and appropriations for subsidies to family farm purchases. The Ministry of Agriculture retains the responsibility for apportioning the funds

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<sup>29</sup> US farmers' debts can be divided into two broad categories: debts for purchases of land (and structures on land) and debts for purchases of non-land assets (or "movable" property including such things as farm machinery, animals, fertilizer, seeds, and fuel). Outstanding farm debt in 1995 was approximately \$151 billion. About 53% of the debt was for purchases of land and structures. *USDA/ERS Table 3-4 FarmBusiness Balance Sheet (December 31, 1991-95)* <<http://www.econ.ag.gov/briefing/fbe/sf/fbfp95/tables/baltabs.htm>>

<sup>30</sup> KEITH MEYER ET AL., *AGRICULTURAL LAW: CASES AND MATERIALS* 54 (1985).

<sup>31</sup> Dr. Christian Grimm, *Rural Land Law in Germany* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>32</sup> Michael Gruson, *Landesbank State Guarantees Should Survive EU Challenge*, *INTERNATIONAL FINANCIAL LAW REVIEW* 39 (January 1998); Michael Gruson, *Can Dachshunds Be Whippets?*, *ECONOMIST*, January 4, 1997, at 70. See generally Michael Gruson & Uwe H. Schneider, *The German Landesbank*, *COLUMBIA BUSINESS LAW REVIEW* 337 (1995).

<sup>33</sup> A special agency, the *Cassa per la Formazione della Proprieta Contadina*, was created to act as intermediary between potential sellers and buyers and as a long-term, low-interest lender to individual buyers and farming cooperatives. *Cassa* now operates in cooperation with the regional and provincial authorities. *Infra*, note 34, at vii.

<sup>34</sup> ERIC SHEARER & GIUSEPPE BARBERO, *PUBLIC POLICY FOR THE PROMOTION OF FAMILY FARMS IN ITALY: THE EXPERIENCE OF THE FUND FOR THE FORMATION OF PEASANT PROPERTY* 10 (World Bank Discussion Paper No. 262, 1994).

among the regions.<sup>35</sup> Public financing has been provided because: (a) farmers are not able to pay the rate of interest required by commercial banks; and (b) the European Union and state and regional governments can steer agricultural policy through loaning practices. For example, the European Union will not fund irrigation projects or other investments for certain agricultural products when there is a surplus of such product.

In Italy, if a farmer wants mortgage assistance for a particular project, the farmer must have his project approved by the State or regional public authority and must provide evidence that the project is economically feasible and will increase his return enough to repay the mortgage. If the project is approved, the farmer goes to a private commercial bank for a loan. The State or the European Union will pay a percentage of the cost of the project or may pay part of the interest on the loan.

## B. Purchase Money Mortgages

In the United States, purchase money mortgages are allowed in all 50 states. However, United States data for 1995 show that agricultural mortgage debt declined relative to all agricultural debt, and that non-real estate (moveable property) debt increased. This shift reflects a growing use of favorable non-mortgage credit terms from machinery and input suppliers and a rise in cash sales of farmland.<sup>36</sup>

In Japan, at least two approaches to purchase money mortgage are provided by statute. One approach puts the mortgagee in a position of priority *vis-a-vis* other creditors. The second approach provides for a security contract that relies upon land collateral and a foreclosure procedure that does not require public sale.<sup>37</sup>

Beginning in 1948, Italian law encouraged the development of small family farms through subsidized credit and purchase money mortgages. Prior to this time, access to land depended almost solely on the availability of savings.<sup>38</sup> Among other things, the 1948<sup>39</sup> law provided that mortgage loans were to be provided by agricultural credit institutions and specially authorized banks with a State subsidy on interest payments up to a maximum of 3% for 30 years.<sup>40</sup> In the mid-1960's additional legislation was passed that stressed the objective of

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<sup>35</sup> *Id.*

<sup>36</sup> 1995 *Agricultural Income and Finance*, ECONOMIC RESEARCH SERVICE, October 18, 1996, available in LEXIS.

<sup>37</sup> CIVIL CODE OF JAPAN art. 369, *et seq.*; Japan's Preliminary Registration Security Contract Act, Law No. 78 (1978).

<sup>38</sup> Shearer & Barbero, *supra* note 34, at 7.

<sup>39</sup> Italian Law No. 114 of February 1948 was actually ratified into law by Parliament in 1950. Shearer & Barbero, *supra* note 34, at 7.

<sup>40</sup> At that time, the commercial interest rates for long-term loans were about 9%. *Id.* at 8 & note 7.

promoting efficient family farms appropriate for a market economy within the framework of the newly created EEC's Common Agricultural Policy.<sup>41</sup> Between 1966 and 1975, about 60% of the loans financed the formation of new family farms. The remaining transactions were for enlargement of existing farm units.<sup>42</sup> Borrower default has been low, due in large part to the highly negative real interest rate on the loans.<sup>43</sup>

In France, both purchase money mortgage and a process of preferential creditor priority are used in land purchase transactions and are provided for by statute. The preferential creditor claim has priority over a mortgage, and mortgage priorities are ranked in order of registration.<sup>44</sup>

### C. Transfer of Subject of Mortgage

In the United States, a mortgagor may freely transfer the mortgaged real estate. A mortgage provision preventing transfer is void as an illegal restraint on alienation.<sup>45</sup> However, the mortgage agreement may authorize the mortgagee to accelerate the debt if the mortgagor transfers the mortgaged real estate without the mortgagee's consent. Such a clause in the mortgage agreement is called a "due-on-sale clause." Frequently, the parties agree that the mortgagor will pay off the mortgage debt and transfer the real estate free from the mortgage. The purchase price is set at an amount sufficient to pay the mortgagor his equity in the real estate and also to satisfy the mortgage debt. The transferee generally obtains a new mortgage loan to purchase the real estate.<sup>46</sup>

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<sup>41</sup> *Id.* at 9. Italian Law No. 590 (1965). Before Law No. 590 was passed, the government had paid the interest rate subsidy to the banks. The loans under Law No. 590 were financed by a rotating capital fund.

<sup>42</sup> Shearer & Barbero, *supra* note 34, at 16-17.

<sup>43</sup> Access to land is economically complex, and legal frameworks alone will not create a land market. Italy's subsidization program allows family farmers, who may not otherwise be able to compete, to enter into the land market. The legal mechanism—purchase money mortgage—is necessary but not sufficient. The World Bank report on Italy concludes as others have before that: "resource-less peasants cannot be expected to acquire farmland at market prices and market interest rates through any kind of 'reform' mechanism because, even in the case of long-term loans, the amortization payments inevitably tend to reduce family income below the subsistence level." *Id.* at 51 & note 56.

<sup>44</sup> CIVIL CODE OF FRANCE art. 2114, 2103-2.

<sup>45</sup> United States and United Kingdom court decisions usually reflect a strong public policy in favor of the free alienability of privately owned land. As such, restraints on alienation contained in deeds of conveyance are almost always invalidated by the courts. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 35 (1984).

<sup>46</sup> Although due-on-sale clauses are now commonly used by lenders and allowed by state legislatures, the states have in the past been split on whether to allow due-on-sale clauses. Those opposed to due-on-sale clauses argued that they constituted an unreasonable restraint on alienation and that individuals or legal entities would not transfer their mortgaged real estate if they had to pay off the mortgage to do so. Those who favored due-on-sale clauses made two arguments. First, mortgagees are justified in using a contractual provision to get rid of low-interest-rate loans in order to maintain their lending portfolios at or near the current market interest rate. (New mortgage loans would be at the current interest rate which would presumably be higher than a loan made at an earlier date, although this is not always the case.) Due-on-sale clauses tend to reduce the overall mortgage interest rate by alleviating the

A due-on-sale clause is exercised at the mortgagee's option. Rather than exercising the due-on-sale clause, the parties may agree that the existing mortgage will survive the transfer. In this event, the transferee pays the mortgagor the value of the mortgagor's equity and acquires ownership subject to the mortgage. When the mortgage survives the transfer of the real estate, the legal relationship among the mortgagee, the mortgagor, and the transferee depends on whether the transferee assumes personal responsibility for the secured obligation.

If the transferee does not accept personal responsibility, then, if the transferee defaults, the mortgagee may foreclose and have the real estate auctioned, but may not proceed against the transferee personally. However, the original mortgagor remains personally liable for the debt following this type of transfer unless the mortgagee releases him. When the mortgagor is not released, he becomes a surety, liable to the extent the real estate is of insufficient value to satisfy the debt.

If the transferee assumes personal liability for the mortgage debt, then, if the transferee defaults, the mortgagee may foreclose and have the real estate auctioned. He may also obtain a judgment against the transferee on the debt owed or obligation to be performed without foreclosing on the mortgage. The transferee's assumption of personal responsibility for the mortgage debt does not relieve the original mortgagor of liability. Again, the mortgagor becomes a surety, liable to the extent the real estate is of insufficient value to satisfy the debt. The mortgagor is, however, in a much better position when the transferee assumes personal liability because the transferee has greater incentive to pay than when he only risks loss of the real estate if he defaults.<sup>47</sup>

Under German law, a mortgage does not restrict the use of land, and an agreement where the owner agrees not to transfer the land or not to encumber the land is void.<sup>48</sup> If the land is sold, the creditor may ratify or refuse the new owner's assumption of the debt. Notice to the creditor of the sale must be made in writing and contain reference to the fact that the person assuming the debt takes the place of the former debtor, unless the creditor declares his refusal within six months. If the creditor refuses, the original debtor is still liable for the debt. The land, of course, continues to remain subject to the mortgage while in the hands of the new owner.

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mortgagees' need to charge exceptionally high rates on new mortgage loans in order to compensate for low returns on outstanding loans. Second, those in favor of due-on-sale clauses argued that due-on-sale clauses should at least be allowable if the mortgagee establishes that a specific transfer would impair the mortgagee's security or increase the likelihood of default. See, Eric J. Murdock, *The Due-on-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 1984 DUKE LAW JOURNAL 121 (1984).

<sup>47</sup> JOHN W. BRUCE, REAL ESTATE FINANCE 88-102 (1979).

<sup>48</sup> CIVIL CODE OF GERMANY sec. 1136 (1992).



Italian and French<sup>49</sup> law have similar procedures regarding third party transferees. Under Italian law, a third person transferee of the mortgaged property who is not personally liable to the mortgage creditors can free the property of mortgages within 30 days of the transfer. The third person transferee must serve notice through the court to all creditors of the property that she wants to free the property of the mortgage(s). The notice must provide information about the instrument affecting the transfer, the nature and location of the mortgaged property, and the price agreed to or value declared. The price or declared value cannot be lower than the value established as a basis for auctions by article 2910 of the Code of Civil Procedure in case of expropriation. The notice must also include an offer to pay the price or declared value. The creditor has the right to demand public sale of the property within forty days. If the creditor demands public sale, he must serve notice to the transferee and must state that the price for the property will be one-tenth more than the agreed price or declared value. If the creditor does not demand forced sale, the transferee pays the agreed price and frees the property of mortgages. If, after the creditor demands public sale, the original transferee pays more for the property than was originally agreed upon between the mortgagor and the original transferee, the transferee has recourse against the mortgagor/seller for that portion of the final sale price that exceeds the original sale price.<sup>50</sup> The rather complicated provisions adopted in Lithuania, described in section II. E. above, contain numerous similarities to these.

#### **D. Notice, Opportunity to Cure, Penalties, and Insurance**

In the United States, a mortgagor defaults when the mortgagor fails to pay an installment payment of the underlying debt or to perform some other obligation secured by the mortgage. The mortgagor may also default if he fails to pay taxes or insurance premiums.<sup>51</sup>

When a mortgagor defaults, most mortgage agreements authorize the mortgagee to accelerate the entire debt. Without an acceleration clause, the mortgagee can institute foreclosure proceedings to recover only the amount the mortgagor currently owes. Under the acceleration clause as normally drafted, the mortgagee usually has the option to accelerate once the mortgagor defaults; acceleration of the debt due is not automatic. Most states require that the mortgagee send formal notice to the mortgagor stating that the debt will be accelerated and when the debt will be accelerated.

In the U.S. State of Iowa, for example, if a creditor believes that a borrower is in default on an agricultural mortgage, the creditor must give the borrower notice and notice of his right to cure the default (if he has the right). The borrower has the right to cure unless the creditor has given the borrower notice of right to cure with respect to two prior defaults on the obligation

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<sup>49</sup> See CIVIL CODE OF FRANCE bk. 3, chs. VI and VIII.

<sup>50</sup> CIVIL CODE OF ITALY arts. 2889-97.

<sup>51</sup> In the United States these tax and insurance payments are often paid into an escrow account, and the mortgagee makes the payments for the mortgagor out of this account. 55 American Jurisprudence 2d [Mortgages] secs. 500, 501 (1996).

secured by the mortgage. The borrower also does not have the right to cure the default if the creditor has given the borrower notice of the right to cure within 12 months prior to the default.<sup>52</sup> If the borrower has the right to cure a default, the creditor cannot accelerate the debt or otherwise enforce the obligation until 45 days after notice of the right to cure has been given. During the 45 days, the borrower can either pay the unpaid installments, plus a delinquency charge of the scheduled annual interest rate plus up to 5% per annum for the period between the giving of the notice of the right to cure and making the payment, or the amount stated in the notice of the right to cure, whichever is less, or by tendering any performance necessary to cure the default.<sup>53</sup>

Under a number of U.S. state laws, mortgagors have the right to redeem, meaning they have the right to pay off the mortgage debt up to or, in some states, even after the completion of the foreclosure proceedings.<sup>54</sup> The mortgagor, transferees, heirs, devisees, lessees, and overlying mortgagees have the right to redeem. When several individuals have the right to redeem, they may redeem in the order of the priority of their interests. The mortgagor has the highest priority right to redeem. In most cases, the redeeming party will have to pay off the entire mortgage debt to redeem because the debt will have been accelerated.<sup>55</sup> Some redemption statutes allow the borrower a specified time period after the foreclosure sale in which to redeem the collateral, sometimes up to two years.<sup>56</sup> Such a redemption right serves to provide the mortgagor an opportunity to rectify foreclosure sale price inadequacy.<sup>57</sup> It may be argued, however, that a post-foreclosure redemption right (at least one of some minimal length, such as 30 or 60 days) can reduce the interest of potential buyers to participate in foreclosure sales, or (paradoxically) can reduce the price paid at the foreclosure sale because buyers must, in effect, "self-insure" against the existence of the small risk that the right will be exercised.<sup>58</sup>

Other U.S. states have right of first refusal statutes, which require that the purchaser of collateral at a foreclosure sale, upon receiving an offer to purchase or lease from a third party, must give the original borrower a preemptive opportunity to purchase the collateral at the offered price

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<sup>52</sup> See, e.g., IOWA CODE ANNOTATED sec. 654.2A.(2)(3).

<sup>53</sup> *Id.* sec. 654.2A(4).

<sup>54</sup> Redemption statutes applicable to mortgage foreclosure sales presently exist in twenty-five US states. An amendment in Illinois reduced the redemption period from twelve months to three months. Act of May 24, 1957, 1957 ILLINOIS LAWS 279, 281, sec. 18(c); Patrick B. Bauer, *Statutory Redemption Reconsidered: The Operation of Iowa's Redemption Statute in Two Counties Between 1881 and 1980*, 70 IOWA LAW REVIEW 343, 345-47 (January 1985).

<sup>55</sup> GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 467-72 (3rd ed. 1994).

<sup>56</sup> *Id.* at 611.

<sup>57</sup> Bauer, *supra* note 54, at 345-46.

<sup>58</sup> The buyer at the foreclosure sale will, of course, recover what he paid if the right of redemption is exercised. But there may be non-compensable costs to him as well, for example, if he has "settled in" to the farm and the local community before the right of redemption is exercised.

before he accepts the third party offer.<sup>59</sup> The borrower must exercise his option within a specified time of receiving notice of the offer (within ten days, for example). The seller is not required to offer the original borrower financing or other concessions. The right of first refusal may, in some jurisdictions, exist without limitation as to time.<sup>60</sup>

In Italy, the *Cassa*, an intermediary national public organization between the farmer and the loaning institution,<sup>61</sup> provides two years of grace for overdue payments, but charges 10% interest<sup>62</sup> on the overdue balance. After that, it proceeds rapidly to foreclosure under existing Italian law and procedure.

German law provides that if the security of the mortgage is endangered, the creditor may fix an adequate period of time for the debtor to eliminate the danger. No specific amount of time is set, leaving the particular arrangement up to the debtor and creditor. However, after the expiration of the period, the creditor is entitled to seek immediate satisfaction from the mortgaged land if the danger has not been eliminated or if the mortgage has not otherwise been secured.<sup>63</sup> The creditor may also seek an injunction against the owner of the land and his actions.<sup>64</sup> The German Civil Code allows but does not require insurance of the property.<sup>65</sup>

Under German law, if the mortgage is due but the creditor is not satisfied, the mortgagee can demand satisfaction out of the land and property to which the mortgage extends. The court must order any foreclosure sale. The creditor can apply for such enforcement order if he has a notarized agreement by which the mortgagor subjects his property to immediate foreclosure. This agreement is usually signed at the time the mortgage contract is created.<sup>66</sup>

### E. Foreclosure

United States federal law and many U.S. State laws provide some limited protection against foreclosure proceedings directed toward a mortgagor's principal residence. Originally created to protect the home and nearby surrounding property of farmers and ranchers, these

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<sup>59</sup> Leif C. Jensen, *Agricultural Lending in the 1980's: An Insurance Company's Perspective*, MEMPHIS STATE UNIVERSITY LAW REVIEW 353, 359-61 (1988).

<sup>60</sup> See, e.g., IOWA CODE ANNOTATED sec. 654.16A (1997).

<sup>61</sup> See section III. A. above for a discussion of *Cassa*.

<sup>62</sup> At the time, the interest rate for the loan was 4%. Shearer & Barbero, *supra* note 34, at 34.

<sup>63</sup> CIVIL CODE OF GERMANY, sec. 1133.

<sup>64</sup> *Id.* sec. 1134.

<sup>65</sup> See generally *id.* secs. 1127-30.

<sup>66</sup> BUSINESS TRANSACTIONS IN GERMANY (FRG), (BERND RUSTER, ed.) current through 4/2/96.

"homestead" exemptions exist in a variety of forms. United States federal homestead protections extend to borrowers of loans made or insured by the Small Business Administration and the Department of Agriculture who have pledged property to secure the loans. These protections permit the mortgagor, when the Small Business Administration or the Department of Agriculture forecloses the mortgage and if certain farming income criteria from early periods of farming operations are met, to rent in his principal residence, adjoining property, farm outbuildings, and no more than ten acres of adjoining land during the course of the foreclosure and sale proceedings. The term of the homestead rental cannot exceed five years but will not be less than three years. A first right of refusal privilege accompanies the homestead rental and permits the mortgagor to re-acquire the property on terms not less favorable than those intended to be offered to any other buyer.<sup>67</sup> U.S. State homestead laws vary widely, with many expressly excluding homestead exemptions for foreclosure of purchase money mortgages.<sup>68</sup>

In the United States, the right of the mortgagee to possession of the mortgaged real estate varies from state to state. However, the right to possession is important because it includes the right to collect rents and profits. For this reason, most states allow the mortgagee to take possession after the mortgagor defaults on the loan. If the mortgagee exercises control over the real estate, he may have possession without actually entering or occupying the mortgaged real estate. The mortgagee may collect all rents and profits arising from the real estate between the time the mortgagor defaults and the time the mortgagor either pays the debt owed or the real estate is auctioned. However, the mortgagee must use diligence in leasing out the real estate, and, if he does not, the court can charge him for rent he could have secured if he had been diligent. If the mortgagee occupies the real estate for his own use, he must deduct from what is owed to him the reasonable rental value of his occupancy.<sup>69</sup>

If a lease existed at the time the mortgage agreement was executed, the mortgagee is bound by the lease. If the lease was executed after the mortgage, the mortgagee may take possession and terminate the lease on the theory that the lessee has no greater right to possession than his lessor. However, if the mortgagee does not take possession of the real estate, the lessee does not have to pay the lease payment to the mortgagee because the lessee did not originally contract with the mortgagee. This is a difficult situation for the mortgagee, so many mortgage agreements include clauses concerning such situations.

In all U.S. states, the mortgagee may request that a court appoint a person or legal entity (a receiver) to collect rents and profits if there is an action for foreclosure. A receiver is appointed to preserve the mortgaged real estate during the time of the foreclosure proceedings. The court decides whether a receiver should be appointed. If a receiver is appointed, the receiver is usually empowered to preserve the mortgagee's security by taking possession of the mortgaged real estate and collecting rents and profits. Mortgagees frequently request the

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<sup>67</sup> 7 UNITED STATES CODE ANNOTATED chapt. 50, sub chapt. IV, sec. 2000 (1998).

<sup>68</sup> See, TEXAS CONSTITUTION art. XVI, Sec. 50; WASHINGTON REVISED CODE, sec. 6.13.030-080 (1997).

<sup>69</sup> Nelson & Whitman, *supra* note 55, at 178-82, 185-89.

appointment of a receiver to operate the mortgagor's business pending foreclosure. A court will generally grant the request only if the business itself and not just the real estate are the subject of the mortgage, as in the example of an apartment building.<sup>70</sup>

In Germany, although agricultural land can be sold at auction upon default, there are special procedures for sale of agricultural land that secure the livelihood of the farmer and his family. The federal government is entitled to pass a law that will prevent abuse of this act, but such a law has not yet been passed.<sup>71</sup>

Under French law, the foreclosure proceeding takes an average of 18 months. The procedure includes notice and a hearing with the debtor and the creditors. The length of the procedure is designed to protect the debtor, and allow him to cure or to close down his farming operation. Moreover, the length and expense of the procedure discourages creditors from foreclosing when only a small amount of debt is owed. In fact, court-ordered sales are rare. Out of 400,000 disputed claims, foreclosure proceedings were instituted in only 4,500 cases and only 11% of those reached the state of public sale.<sup>72</sup>

#### **F. Sale of Agricultural Land Under Foreclosure**

In Japan, when agricultural land is offered at a public sale, a permit is required and only cultivators are qualified as buyers. Public sale at foreclosure is not treated differently than other sales of agricultural land. If no qualified buyers come to the public sale, the creditor may request that the national government purchase the land as a last resort to satisfy the debt.<sup>73</sup> The government is then required to sell the land to qualified farmers.<sup>74</sup>

#### **G. Regulations Regarding Bank Ownership of Land**

Bank ownership of agricultural land as a consequence of foreclosure is an issue on which developed market economies have taken a wide range of approaches. In the United States, federal law places restrictions on the ability of banks to own land.<sup>75</sup> A bank may own real estate only under two limited sets of circumstances. First, a bank may own real estate necessary to conduct the bank's business. This includes the real estate where the bank conducts its business, including parking and off-site processing facilities.

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<sup>70</sup> *Id.* at 195-211.

<sup>71</sup> Grimm, *supra* note 31.

<sup>72</sup> Isabelle Couturier, Rural Land Law in France (May 1998) (unpublished manuscript on file with Rural Development Institute).

<sup>73</sup> Japan's Agricultural Land Act, arts. 33-35 (1952).

<sup>74</sup> *Id.* art. 36. The statute does not limit the amount of time that the government is able to hold the land.

<sup>75</sup> 12 UNITED STATES CODE sec. 29 (1997).

Second, a bank may obtain real estate that has served as security for a debt held by the bank. The bank will become the owner of such real estate, in most instances, by either foreclosing the mortgage and bidding the amount of the debt at the foreclosure sale, or by accepting a deed to the real estate from the debtor in lieu of foreclosure.<sup>76</sup> However, once it has obtained forfeited real estate, the key provision of the relevant federal law is that the bank must dispose of it within five years.<sup>77</sup> During the five-year period, the bank controls the use of the real estate. It may make repairs or improvements that will increase the value and marketability of the real estate, but it cannot hold the real estate solely for investment purposes. The bank may petition the government for an additional five years to market the real estate if it has made a good-faith effort to dispose of the real estate but is unable to do so, and if the disposal of the real estate would be detrimental to the bank.

In Japan, agricultural credit cooperatives and private banks provide financing to farmers. Neither of these organizations is allowed to own agricultural land. The provisions are more stringent than those under United States law are: if land cannot be sold at public sale, the mortgagee can request that the national government purchase the land to satisfy the debt. See section III. F. above.

In Italy, restrictions on bank ownership of land are also stringent. Private commercial banks are not allowed by the Central Bank to retain ownership of land sold at a foreclosure sale. By contrast, there are no prohibitions or restrictions on ownership of land by financial institutions in Germany.

Under French law, the creditor may become the owner of the debtor's property only if the debtor signs a contract at the time the mortgage agreement is signed stating that the creditor has the right to have the property transferred to him for lack of payment by the debtor. This procedure is rarely used.<sup>78</sup>

#### **IV. Checklist of Potential Legal Impediments and Solutions**

The following section lists potential impediments to a functioning mortgage system in ECA countries. Some of these may be an impediment in one country but not in another depending on the legal and institutional framework of particular countries. For each impediment, potential solutions have been identified based on examples from developed market economies. These solutions should be evaluated in the context of the country for which they might be considered. Many of the potential solutions presented will not be appropriate for every country.

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<sup>76</sup> Nelson & Whitman, *supra* note 55, at 93-95.

<sup>77</sup> 12 UNITED STATES CODE sec. 29 (1997).

<sup>78</sup> Couturier, *supra* note 72.

**Potential Impediment: Insufficient legal rules govern mortgage.**

**Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing mortgage (for a checklist of items to be included in such legislation, see section V of this chapter).

**Potential Impediment: A lack of security in land rights and lack of transferability in land rights may make it impossible to mortgage land.**

The lack of a secure expectation of continued land possession and/or the lack of the right to transfer land make mortgage plainly unworkable. Without secure rights, lenders will not lend on the security of land. Without transfer rights, a land market will not exist, collateral cannot be realized, and lenders (unable to predict land values or sell upon default) will not engage in mortgage lending. Any legal restrictions that create uncertainty concerning tenure security or transferability among farmers/borrowers and lenders can be fatal to the emergence of land mortgage.

**Potential Solutions**

- As a matter of positive law, provide for secure land tenure, permit free transfer (at least over a wide range of situations),<sup>79</sup> and specifically provide that agricultural land can be used as collateral.
- Avoid regulations that indirectly threaten security, limit transferability, or hamper mortgage.
- Develop a public institution to provide subsidies to borrowers who want to start peasant farms or expand existing peasant farms. Depending on the particular country setting and circumstances, some of the risk to lenders might be absorbed by the public institution, which would act as a guarantor and an intermediary between the private lender and the borrower.

**Potential Impediment: A lack of specific mortgage regulations and forms may retard mortgage practice.**

Even if mortgage is legally permitted and enabled by secure land rights and free transferability, a lack of a specific regulations, procedures, and forms may retard mortgage in practice and consequently hamper the credit market.

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<sup>79</sup> See Chapter 7, *Land Transactions*.

### **Potential Solution**

- Adopt specific procedures and forms (including model contracts) that expressly define protocols, rights, and responsibilities. Liberally adapt and adopt the frameworks and models that are used by other countries. Use standardized procedures and forms to the widest extent possible.

**Potential Impediment: Limitations on the types of land that can be mortgaged may inhibit the development of credit.**

Regulations that prohibit mortgage of agricultural land, limit the value that can be placed on it as collateral, or limit the types of improvements that can be funded with borrowed money can substantially inhibit the development of a credit and land market.

### **Potential Solution**

- Forego such regulations in their entirety; rely instead upon credit and land market supply and demand to control mortgage activities.

**Potential Impediment: Lack of express authorization for purchase money mortgages may exclude buyers who lack funding to make cash purchases.**

The credit (and land) market can be made inaccessible to first-time buyers of land and to others whose existing landholding is already mortgaged by failing to explicitly allow or by implicitly forbidding purchase money mortgages. The land market as a whole can be hampered by excluding buyers who lack funding to make cash purchases of property.

### **Potential Solution**

- Explicitly allow purchase money mortgages in law and facilitate their use by establishing appropriate regulations and procedures.

**Potential Impediment: Default and foreclosure rules regarding notice, opportunity to cure, penalties, and insurance are overly broad, overly restrictive, vague, or do not exist.**

Overly-broad or vague rules (concerning non-payment penalties, for example), overly restrictive rules (concerning collateral insurance requirements, for example), or a simple lack of rules (concerning notice of foreclosure, acceleration, and opportunity to cure, for example) discourage or indirectly prohibit mortgage.



### **Potential Solutions**

- Adopt clear and objective rules of appropriate scope regarding mortgage to define protocols, rights, and responsibilities.
- Legally require that formal notice of default and the borrower's right to cure the default be sent to the debtor in case of default. Limit the number of times a borrower has a right to cure (three times overall, or once in 12 months).
- Provide in law that the creditor may accelerate the debt after giving the debtor a specific period of time to cure the default (such as 45 days).
- Provide debtors the legal right to pay off the mortgage debt up to or following the completion of the foreclosure procedures, but do not allow an extended period for post-foreclosure relief.
- Provide the original borrower the legal right to re-purchase the real estate at the price offered at the foreclosure sale.
- Provide for a long period of grace for overdue payments in law but allow a higher interest rate during the grace period.
- Allow the creditor and borrower to contract for the amount of time that will be allowed to cure a default. Allow the creditor to seek an injunction against the borrower for actions that may impair the property.

### **Potential Impediment: Overly restrictive rules intended to protect mortgagors can lead to fewer mortgages.**

Overly restrictive rules intended to protect mortgagors can have a chilling effect on the credit market and can prompt lenders either to refrain from mortgage lending or to charge burdensome interest rates to cover associated risks. Examples include rules that prohibit the eviction of a mortgagor from a residence upon foreclosure, provide for inappropriately long periods between default and foreclosure sale, and require foreclosure sales at tender rather than on an open market.

### **Potential Solutions**

- Develop legal procedures that protect the livelihood of the farmer and his family during foreclosure, but establish a time lapse between default and foreclosure that is not excessively long.

- If the buyer at a foreclosure auction offers to lease or sell the real estate to a third, the original mortgagor could be granted the legal right of first refusal to purchase or lease the real estate on the same terms.

**Potential Impediment: Overly restrictive rules intended to protect mortgagees may reduce land market activity.**

Overly restrictive rules intended to protect mortgagees can have a chilling effect on the land market. For example, requiring the consent of the mortgagee before the mortgagor can transfer the subject of mortgage can unnecessarily reduce land market activity.

#### **Potential Solutions**

- Do not mandate the written consent of the mortgagee before the mortgagor can transfer the land (collateral), but, rather, allow the mortgage agreement to authorize (by way of a “due-on-sale” clause) the mortgagee to accelerate the debt if the mortgagor transfers the mortgaged real estate without the mortgagee’s consent.
- Provide in law that the creditor may ratify or refuse the new owner’s assumption of debt. If the creditor refuses, the original debtor is still liable for the debt.
- Provide that a third party transferee has the right to clear the transferred property of the mortgage by paying the creditor a specified (by the third party transferee) sum. Provide in law that the creditor may refuse the payment and sell the property at public auction for at least 10% higher than the offered sum. In ECA settings, where substantial uncertainties affect the land market, this approach may go too far in discouraging mortgagees.

**Potential Impediment: Fear of bank ownership of land and resulting land speculation may lead ECA countries to prohibit banks from purchasing land at foreclosure sales, severely limiting the banks’ options and discouraging mortgage loans.**

Some developed market economies fear that allowing bank ownership of land for investment purposes might prompt land speculation by banks or their accumulation of large amounts of land and related inequities. This fear may be especially strong, and warranted, in those ECA economies in which privatized banks already wield great economic power.

#### **Potential Solution**

- Place appropriate restrictions on the ability of banks and other mortgage lenders to own land where the ownership is acquired as a result of the land’s use as collateral for

a loan by that or any other lender. Limit duration of permitted ownership to the period needed to dispose of foreclosed collateral (2-5 years).

## **V. Basic Provisions Needed in a Mortgage Law**

Following is a broad list of concepts that should be considered when developing a law on mortgage in an ECA country.

1. Provision allowing the mortgagee to commence foreclosure of the mortgage if the mortgagor is unable or unwilling to timely pay or perform the principal obligation secured by the mortgage.
2. Provision stating that the claims of the mortgagee to the proceeds of realization of the subject of mortgage shall have priority over all other creditors of the mortgagor. Exceptions can be noted.
3. Provision permitting mortgagor to retain possession of real estate at least until the time of commencement of foreclosure of mortgage proceedings.
4. List of obligations and claims that may be secured by a mortgage. Purchase money mortgages explicitly allowed.
5. List of interests in real estate that may be the subject of mortgage.
6. List of the contents of a mortgage agreement and description of how to effectuate the mortgage agreement.
7. Mortgagor requirements for protection of the subject of mortgage and mortgagee's remedies if mortgagor fails to fulfill obligations. These provisions should include: mortgagor's use and repair of the subject of mortgage; protection against loss of the subject of mortgage; insurance of the subject of mortgage, and mortgagor's obligation to defend against claims of third parties against the subject of mortgage.
8. Requirements for transfer or encumbrance of the subject of mortgage. These provisions should allow for alienation while at the same time protecting the mortgagee's interests.
9. Provision allowing overlying mortgages ("second" and subsequent mortgages) and describing the priority of claims of underlying mortgagees.
10. Description of grounds for foreclosure and grounds for acceleration of the principal obligation secured by the mortgage. Requirements for notification and opportunity to cure a default or failure to fulfill the obligation, including time periods.
11. Procedure for foreclosure of mortgage.

12. Procedure for realization of the subject of mortgage and disbursement of proceeds, including restrictions on penalty charges or other add-ons by mortgagee.
13. Procedure for termination of the mortgage.
14. Obligations of mortgagee bank that acquires subject of mortgage.
15. Standardized mortgage forms and contracts that inform both mortgagor and mortgagee of their rights and duties under the mortgage agreement.

# Land Registration

by Brian Schwarzwald

## I. Introduction

The information concerning land that forms the core of a land registration system is important for enhancing land tenure security and stimulating and guiding the evolution of land markets. A land registration system can stimulate a land market by removing obstacles such as procedural difficulties in transferring land, lack of information, unclear delimitation of individual and group rights, and insecure ownership. Registration of land rights provides potential buyers or renters with a way of verifying that the rights they are prepared to purchase in fact belong to the seller, thereby reducing the risk of such transactions.<sup>1</sup> Effective land registration systems can also provide security for banks to issue loans to owners of real estate in order to improve the productivity of the land, create an improved basis for a land tax, and improve land and public administration.<sup>2</sup>

## II. Impediments to Effective Land Registration Systems in ECA Countries

### A. Lack of Legal Rules

A detailed set of rules and procedures clearly defined in law are a prerequisite for any land registration system. Many ECA countries have already made initial attempts to develop a legal framework for land registration. The experiences of several countries, however, indicate that a lack of clear legal rules can impede the registration process.

In Belarus, the procedures for registration of rights to land lack a clear legislative basis. Many legal issues of registration are simply not addressed because practice has been put ahead of creating a legal framework. In the absence of a general law governing land registration, the legal implications of registration, or of failing to register, are not clear and the procedures for registration are mostly undefined.<sup>3</sup>

<sup>1</sup>HANS BINSWANGER ET AL., POWER, DISTORTIONS, REVOLT, AND REFORM IN AGRICULTURAL LAND RELATIONS 64 (World Bank Policy Research Working Paper No. WPS 1164, July 1993).

<sup>2</sup>Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 647, 657-64 (1998) (describing the potential advantages of a land registration system).

<sup>3</sup>Stephen Butler, Registration of Rights to Immovable Property in the Republic of Belarus: Issues of Law and Administration in the Former Soviet Union 10 (1996) (unpublished manuscript on file with the Rural Development Institute). A set of government "recommendations" regarding registration of immovable property has been issued,

A federal law on state registration of rights to immovable property has not yet been adopted in the Kyrgyz Republic.<sup>4</sup> Government regulations control the process of documentation and registration of land plots and land shares when the government transfers land to private parties.<sup>5</sup> Moreover, regulations for registration of transactions between private parties have not been promulgated, and registration of sales, bequests, gifts, mortgages, or other transactions between private parties is not occurring in the countryside. Meanwhile, the practice of registering newly privatized land rights and transactions concerning those rights must go on at the local level. However, the lack of a legally based, functioning registration system for transactions between private parties increases transaction costs. For example, farmers who mortgage their land are required to submit stacks of paperwork, which they must gather from many different sources.<sup>6</sup>

Even when a law on land registration has been adopted by a particular ECA country, it may take a significant period of time before the administrative machinery of land registration begins operating consistently with the law. This can create uncertainty about titles that are registered during the period after the law's adoption but before the proper administrative machinery is in place. In Moldova, for example, the recently enacted Law on Real Estate Cadastre provides for creation of a national system of county-level registration offices that will register all legal rights in land and other real estate. It is estimated that the system will require several years to become fully functioning. In the interim period, there is concern that existing procedures for registering land sales and other land transactions may not be used and that a procedural vacuum will retard the development of a land market.<sup>7</sup>

## **B. Registry Does Not Provide Conclusive Evidence of Title**

Two basic categories of land registration systems exist. The first to develop was *registration of deeds* (called *land recordation* in the United States<sup>8</sup>), which involves the

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but these recommendations are not considered binding legal authority. Interview with Professor Aleksandr Khraputsky, Belarus State University Law Department (July 8, 1998).

<sup>4</sup> A draft registration law, however, is currently before the Kyrgyz Parliament and expected to be passed in the near future. Portions of this draft registration law are discussed in later sections of this chapter.

<sup>5</sup> Regulation of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Right," adopted by Resolution of the Government of the Kyrgyz Republic No. 632 (August 22, 1994).

<sup>6</sup> Rural Development Institute field research in the Kyrgyz Republic, October 1997.

<sup>7</sup> Robert Mitchell, Land Market Problems in Moldova 1 (June 1998) (unpublished memorandum on file with the Rural Development Institute).

<sup>8</sup> For a detailed description of the United States' land recordation system, please see *infra* Section III. A of this chapter.

registering or recording of documents affecting interests in land. The second system is *registration of title* (also called *land title registration* or simply *title registration*).<sup>9</sup>

Under a registration of deeds system, it is the deed (a contractual document to transfer a property right) itself which is registered. Registration of the deed provides notice to third parties of the agreement and asserts the change in rights to all third parties. Registration of the deed helps to protect the purchaser's rights against adverse claims of other parties, but registration is not conclusive evidence of the current status of legal land rights. Title must be deduced from scrutiny of all relevant deeds in the registry. What is recorded is merely evidence of title. Interested parties must investigate the evidence and make their own conclusion about the title status. Moreover, the state does not guarantee and insure the correctness of the information in the registry.

Under a title registration system, the registry is conclusive evidence of the status of title. The register records not merely evidence but what in effect is a final, complete, and current judgment.<sup>10</sup> The distinctive ingredient of title registration is that title to interests in land depends on what the register shows, and not on extraneous instruments.<sup>11</sup> The state typically guarantees and insures the accuracy of the information in the title registry.<sup>12</sup>

Land title registration was first introduced in 1858 in Australia by Sir Robert Torrens. Torrens' idea was that a land register should show the actual state of ownership, rather than just provide evidence of ownership, and guarantee all rights shown in the land register. Shortly after Torrens introduced the concept of title registration in Australia, a similar system began developing (although very slowly) in England.

The essence of a title registration system is the land register, which states the identity of the owners of the title. It also lists all encumbrances (easements, liens, mortgages, leases, covenants, and the like) to which that title is subject. With a few minor exceptions, the register's statement as to the tenure rights is conclusive; that is, it is legally impossible for it to be incorrect. Of course, the responsible officials may make an error, vesting title in the wrong

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<sup>9</sup> The two categories are not mutually exclusive. Instead, each category is composed of different alternatives, and the combined alternatives form a continuum. The major variables in this continuum include the conclusiveness of the registry information concerning title status and the extent of affirmation made by the State of that information.

<sup>10</sup> This is always subject to certain overriding interests. See section II.C. in this chapter.

<sup>11</sup> Instruments are still needed to provide evidence to the registrar of an owner's intention to create, transfer or extinguish rights in land. While the instrument may establish a contractual right, it cannot in itself affect or transfer a land right, because the title registration law normally provides that only the appropriate entry in the registry can legally affect or transfer such right.

<sup>12</sup> Some use the terminology of *negative* and *positive* systems of registration rather than *registration of deeds* and *registration of title*. A negative system simply records all transactions which involve a parcel. This record does not legally provide title, but does act as a witness in the case of disputes. In contrast, the positive system establishes a title to the parcel and is (normally) guaranteed by the government.

person or failing to include a valid encumbrance. However, the register is still legally binding. The victim of such a mistake loses her interest in the land, and has recourse only by the way of a claim for monetary compensation against the indemnity fund that the system operates for that purpose.<sup>13</sup>

The register is maintained by a public official called the registrar. If encumbrances are added or removed, appropriate notations are made in the register. If an owner transfers his or her land, the deed is brought to the registry and the registrar makes a new entry on the register (in systems which use certificates, a new certificate is issued) in the name of the new owner. No historical search of title is necessary or even relevant.<sup>14</sup>

The registrar maintains files or books containing the originals or copies of all documents referred to on the land register so an examiner can review them. These files of books are usually indexed by parcel, permitting easy location of information relating to any particular parcel of land. A person (such as a prospective purchaser) wishing to learn the status of land rights concerning a particular parcel need only inspect the current land register. If that person wishes to go further and learn the details or the history of the land rights on that parcel, he or she may read and evaluate the documents referred to in the register, but this is not normally necessary. The title examination process is vastly simplified and there is no need to duplicate searches as successive transfers of the same land occur. That is, only the most recent information is relevant; there is no need for the buyer, the buyer's attorney, or a title insurance company to consult the whole history of land tenure on that parcel for every new transfer.

Almost all commentators agree that title registration is superior to all present systems of title protection based upon registration of deeds land recordation.<sup>15</sup> Title registration makes land titles more reliable, and is simpler, more logical, and less costly. For these reasons, land registration systems that do not provide conclusive evidence of title can impede the land registration process.

ECA countries will be better served by adopting title registration systems than registration of deeds systems. Establishing a title registration system is simplified in country settings where private rights to land are just being introduced because the chain of title is a blank slate and need not be investigated in order to establish a starting point. For this reason, adopting a title registration system while or before most land is privatized will prove easier than trying to

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<sup>13</sup> R. CUNNINGHAM ET AL., THE LAW OF PROPERTY 828-29 (1984).

<sup>14</sup> *Id.* at 829.

<sup>15</sup> See *id.* at 97, 98; see also John McLaughlin and David Palmer, *Land Registration and Development*, ITC JOURNAL 1996-1 at 22-3; JESSE DUKEMINIER & JAMES KRIER, PROPERTY 768-70 (1988); McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE LAW JOURNAL 1125, 1129-31 (1939); Barry Goldner, Comment, *The Torrens System of Title Registration: A Proposal for Effective Implementation*, 29 UNIVERSITY OF CALIFORNIA LOS ANGELES LAW REVIEW, 661, 681-86 (1982); Martin Lobel, *A Proposal for a Title Registration System for Realty*, 11 RICHMOND LAW REVIEW 501, 525 (1977); Joseph Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 JOURNAL OF LEGAL STUDIES 213-15 (1977).



adopt or convert (from a deeds registration system) to a title registration system at a later stage of development. Furthermore, the administrative demands placed on the registrar are not necessarily greater with a title registration system as some argue. Because the registered information in any deeds registration system is likely to have legal significance,<sup>16</sup> both systems rely on the competence, integrity, and judgment of the registrar.<sup>17</sup> Organizing registered information in a manner conducive to allowing the registrar to make rapid and accurate judgments on the current title status is not an onerous ongoing task.

Kazakhstan's registration decree is a good example of a legal enactment governing land title registration that explicitly states and clarifies that the land register provides conclusive evidence of the land rights pertaining to a particular land parcel. The Presidential Decree on Land Registration provides that rights to immovable property arise only after their registration.<sup>18</sup> Registered rights to immovable property are deemed to be superior to unregistered rights that arise by contract or any other legal fact which may be a basis for such rights.<sup>19</sup>

### C. Unregistered Rights Needing Clarification or Protection

In nearly all land registration systems, including title registration systems, certain categories of land rights and restrictions are considered valid even if they are not included in the register. Such rights and restrictions are often referred to as "overriding interests" and typically include tax liens and general land use restrictions contained in legislation. These unregistered, but legally valid, rights or restrictions would normally not be revealed in land titles or deeds. Most fall into two categories. The first is liabilities that arise under statute such as land taxes, land use regulations, certain public easements, or the possibility of compulsory acquisition.<sup>20</sup> The second is rights that can be ascertained by inspection of the land or by inquiry of the occupier, such as leases.<sup>21</sup>

The legal enactment governing land registration in any country should make clear what legal rights and restrictions are valid even if they are not registered, but this is particularly

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<sup>16</sup> Registered information in deeds registries typically provides legal protection against adverse claims of third parties.

<sup>17</sup> See S.R. SIMPSON, *LAND LAW AND REGISTRATION*, 21 (1976).

<sup>18</sup> Republic of Kazakhstan, Presidential Decree "On Public Registration of Property Rights and Transactions in Real Estate", art. 3.1 (December 25, 1995) [hereinafter Republic of Kazakhstan Registration Decree].

<sup>19</sup> *Id.* art. 3.2.

<sup>20</sup> Simpson, *supra* note 17, at 18-19. One of the criticisms of Torrens systems in the United States is that these overriding interests become numerous and diminish the original objective of listing *all* rights in a particular land parcel in one place.

<sup>21</sup> Simpson emphasizes that "registration of title does not, and cannot, do away with the need to inspect land before dealing with it." *Id.* at 18.

important for title registration systems. The lack of legal clarification on “overriding interests” can lessen tenure security and impede land market development. In the Kyrgyz Republic, the legal status of such unregistered rights is currently unclear. A draft law pending before the Kyrgyz Parliament, however, should greatly clarify the situation. The draft law contains an article which lists the specific rights and restrictions which are legally valid whether or not they have been registered. These include, among others, rights of tax collection authorities as established by federal legislation, basic land use restrictions and prohibitions (on health, public security, environmental protection, etc.) established by federal legislation, lease or use rights for shorter than three years, and protected rights of spouses and dependents established by federal legislation.<sup>22</sup>

Another related issue concerns the land rights of persons or entities that arose before the adoption of current land registration legislation and are not registered in a way contemplated by the existing registration legislation. In such cases, one must balance two potentially competing objectives. The first objective is creating a comprehensive register that covers all or the great majority of land parcels. The second objective is protecting the rights of existing occupiers who established legal rights before the current registration rules or system was enacted. The second objective is more important than the first and should normally take precedence. To ensure that this occurs, the registration law should explicitly recognize the validity of previously arisen rights.

The registration laws in some ECA countries do not adequately clarify the rights of persons that arose before the effective date of those laws. In Russia, the 1997 Law “On the State Registration of Rights to Immovables and Real Estate Transactions” (Land Registration Law of the Russian Federation), however, presents a good model for such cases. Article 6 of that law provides that the land “rights . . . which have arisen prior to the effective date of the present Federal Law, shall be deemed as legally effective in the absence of their state registration introduced by the present Federal Law” and that public “registration of rights carried out . . . prior to the effective date of the present Federal Law shall be deemed as legally effective.”<sup>23</sup>

Other measures can be taken to include the rights of persons who hold previously arisen land rights in the existing registration system created by new legislation. These include systematic re-registration undertaken by public registry officials or mandating that such previously arisen rights must be registered when subsequently transacted.

### **D. Slow Registration and Titling Processes**

The speed at which land titles are issued or registered can have a significant impact on land market development. For example, in Romania, alienation rights under the land law are tied

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<sup>22</sup> Draft Law of the Kyrgyz Republic “On State Registration of Rights to Immovable Property,” art. 6 (September 1997) [hereinafter Draft Registration Law of the Kyrgyz Republic].

<sup>23</sup> Law of the Russian Federation “On the State Registration of Rights to Immovables and Real Estate Transactions,” art. 11.2 (June 17, 1997) [hereinafter RF Registration Law].

to the possession of legal title and delays in title distribution have severely hampered the creation of a land market.<sup>24</sup> Thus, any provisions in a registration or titling law that cause unnecessary delays in the process become an impediment to land market development.

Slow registration and titling in the Baltic countries (related to the difficulties in the restitution process) has been identified as one of the two biggest obstacles that constrain the development of well-functioning land markets in those countries.<sup>25</sup>

Registration and titling has also gone slowly in Hungary where observers note that the speedy issuance of ownership titles is important for the development of the land sale market.<sup>26</sup> Average delays of six months in the land registration process have heightened uncertainty surrounding real estate transactions.<sup>27</sup>

The document forms prescribed for conducting registrable transactions play an important part in the effective operation of a land registry. Mandating the use of standardized forms increases the speed of the registration procedure and reduces the possibility of mistake. Lawyers often oppose the requirement of such standardized forms since the completion of a straightforward printed form is often so simple that lawyers may find it difficult to justify significant fees to assist with conveyances. However, experience from Australia, England, Kenya, and Sudan shows that it is quite possible to use standardized forms.<sup>28</sup> For example, according to the English Land Registration Rules of 1925, all the transferor needs to do is fill in the title number, the purchase price, and the name of the transferee before she signs the document. If she wants to make alterations and additions, the form allows for them.<sup>29</sup>

### E. High Registration Fees

Legal or regulatory provisions that establish high registration fees can also pose problems. A land registration system is useful to the extent it is comprehensive (covers all or most land). If the initial cost of registering land is too high, landowners may not register and the system will not be comprehensive. Georgia is currently trying to set the equivalent of a \$28 fee

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<sup>24</sup> See GREGORY MOHRMAN, ROMANIAN LAND REFORM (September 1995) (unpublished memorandum of file with the Rural Development Institute).

<sup>25</sup> See William H. Meyers & Natalija Kazlauskienė, *Land Reform in Estonia, Latvia, and Lithuania*, in LAND REFORM IN THE FORMER SOVIET UNION AND EASTERN EUROPE 92 (Wegren ed., 1998) [hereinafter Land Reform].

<sup>26</sup> Csaba Csaki & Zvi Lerman, *Land Reform and Farm Restructuring in Hungary During the 1990's*, in Land Reform, *supra* note 25, at 230-32.

<sup>27</sup> CHERYL W. GRAY, EVOLVING LEGAL FRAMEWORKS FOR PRIVATE SECTOR DEVELOPMENT IN CENTRAL AND EASTERN EUROPE 71 (World Bank Discussion Paper 209, 1993).

<sup>28</sup> Simpson, *supra* note 17, at 360; GERHARD LARSSON, LAND REGISTRATION AND CADASTRAL SYSTEMS 119 (1991).

<sup>29</sup> *Id.* at 119.

for initial registration of land, an amount substantial enough to likely dissuade many or most landowners from registering their land.<sup>30</sup>

Legal provisions that provide for fees without setting any maximum limits have the potential to lead to unaffordably high registration fees. In Kazakhstan, Article 6 of the Decree of the President of the Republic of Kazakhstan “On Public Registration of Property Rights and Transactions in Real Estate” states that “[I]n accordance with legislation, a fee will be charged for registration of rights to real estate and its transactions, as well as for information services.”<sup>31</sup> The decree, however, fails to provide any guidance concerning the appropriate levels for such fees. Article 23 of the decree contains a potentially ameliorating provision under which notarization is not absolutely required for all real estate transactions.<sup>32</sup>

The Land Registration law of the Russian Federation allows the subjects of the Russian Federation to set the fees for registration subject to maximum levels established by the federal government.<sup>33</sup> This approach may increase land right holders’ protection against high fees. One major shortcoming of this approach, however, is that the law neither specifies the maximum level nor identifies other federal legislation containing such guidelines.

Alternative options to high fees would be a fixed, low fee schedule, perhaps with some subsidization by the government; a sliding-scale fee schedule based on a low percentage of the value being transferred; or a fee schedule based on the principle of cost recovery without profit by the registration agency.

For a discussion of transaction costs, see **Chapter 7, *Land Transactions***.

## **F. Institutional Shortcomings**

Institutional shortcomings that interfere with the smooth functioning of a land registration system have the potential to add complexity and cost and reduce the benefits from registration. Specific institutional problems include a lack of clarity in the mandate of the administrative organization with responsibility for registration, the absence of strong support for the organization at political levels, inadequate and erratic funding for registration from the central government, lack of skilled staff with cadastral experience, structural problems within the

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<sup>30</sup> Rural Development Institute phone conversation with Walter Coles, United States Agency for International Development official involved in Republic of Georgia land titling project (1998).

<sup>31</sup> Republic of Kazakhstan Registration Decree, *supra* note 18, art. 6.

<sup>32</sup> *Id.* art. 23.

<sup>33</sup> RF Registration Law, *supra* note 23, art. 11.2.

registration organization, and poor working relationships with other departments and agencies that have overlapping responsibilities.<sup>34</sup>

Institutional issues may be particularly difficult to resolve in many ECA countries, as many agencies with competing objectives can be involved in the land administrative system and in many settings those agencies are competing for oversight and responsibility of a unified land registration system.<sup>35</sup> In some settings, governments have responded slowly and inefficiently in resolving institutional competition and creating a single unit with responsibility for design and implementation of a land administration system.<sup>36</sup>

One expert's proposal for resolving institutional competition without establishing entirely new institutions in Tajikistan may also be applicable for other ECA countries. The proposal calls for an impartial government ministry to oversee the land registration system (in Tajikistan's case, the Ministry of Justice) and for local governments to decide which agency (among those currently undertaking some registration function) will undertake the registration function in their particular locality. The local government's decision would be subject to a Ministry of Justice certification after which the selected and certified local office would undertake land registration under the Ministry's oversight.<sup>37</sup>

In Uzbekistan, the Civil Code provides that the right of ownership arises at the moment of registration (Article 185) and that the right of ownership, transfer, limitation, and termination of rights to immovable property are subject to state registration (Article 84). However, a registration agency for immovable property is not identified in the Civil Code. Under the Law on Land, ownership and lease of land plots is registered with local governments or regional governments depending on the type of land (Articles 4,5,6). Regional governments are also responsible for control over land, allocation of land, withdrawal of land, and cessation of the rights of ownership to land. The same organization is responsible for protecting land use rights through documentation and registration and for confiscating land use rights, creating a serious conflict of interest.

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<sup>34</sup> GERALD MCGRATH ET AL., ISSUES AND KEY PRINCIPLES RELATED TO THE IMPLEMENTATION OF CADASTRAL AND LAND REGISTRATION SYSTEMS: A PERSPECTIVE FROM EASTERN EUROPE AND THE FORMER SOVIET UNION 5 (November 1996) (unpublished manuscript prepared for the International Conference on Land Tenure and Administration, Orlando Florida) (on file with the Rural Development Institute).

<sup>35</sup> In many countries during the pre-reform era, registration functions for land and structures on land rested with different government agencies and/or registration functions for rural areas and urban areas rested with different government agencies.

<sup>36</sup> THE WORLD BANK, LAND REGISTRATION AND LAND TITLING PROJECTS IN ECA COUNTRIES 11 (EC4NR - Agriculture Policy Note No. 2, 1996).

<sup>37</sup> JENNIFER DUNCAN, DRAFT REPORT ON LEGAL IMPEDIMENTS TO DEVELOPMENT OF AN AGRICULTURAL LAND MARKET IN TAJIKISTAN (NOVEMBER 4, 1998) (copy on file with the Rural Development Institute).

Under the land registration system created by Armenia in 1994, three separate government agencies played crucial roles in the registration process. Although the Certificates of Title were prepared by the Soil and Agrochemistry Institute, the examination and validation of proposed sales of land were undertaken by the notary offices, and the Inventory Board of the Communal Services Department was responsible for registration of the these transactions. Such a system provides significant scope for errors, omissions, variable standards, and lack of coordination, all of which jeopardize the effectiveness of the system as a whole. A single, central agency providing policy and direction in land and property systems is normally required to establish an efficient and modern registration system.<sup>38</sup>

There are also potential problems in Russia, not yet fully resolved, due to the fact that the Civil Code adopted in 1994 appeared to give a lead role in the process of registering rights in real estate to the Ministry of Justice<sup>39</sup> at the same time that early registration of rights in agricultural land plots and land shares was being carried out (although within a very limited legal framework) by the State Committee on Land Resources and Land Management (and some urban registration functions were being carried out by yet other agencies). The 1997 Land Registration Law of the Russian Federation provides a framework for an eventually unified system, but potential conflicts between the Ministry of Justice, the new Ministry of Construction, and Goskomzem, and between the federal level and regional governments still need to be resolved.<sup>40</sup>

A 1997 draft law in the Kyrgyz Republic, on the other hand, both creates a single state registration organ, the *Gosregistr*, under the Ministry of Justice, and defines the duties and responsibilities of local registration organs.<sup>41</sup> The “unified state system of registration” is defined as the republican administrative organ (the *Gosregistr*) and local registration organs.<sup>42</sup> The draft law defines the local registration organs as county, inter-county, and city departments in direct subordination to the *Gosregistr*, and gives the *Gosregistr* the authority to develop procedures for their operation.<sup>43</sup>

Article 9 of the Draft Registration Law of the Kyrgyz Republic creates the *Gosregistr*, and describes its administrative function as “to define and regulate the policy of the development of a real estate market and provide State security for the registers rights to immovable

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<sup>38</sup> THE WORLD BANK, ARMENIA: THE CHALLENGE OF REFORM IN THE AGRICULTURAL SECTOR 39 (World Bank Country Study, 1995).

<sup>39</sup> CIVIL CODE OF THE RUSSIAN FEDERATION ch. 6, art. 131[hereinafter RF Civil Code].

<sup>40</sup> Resolution of the Government of the Russian Federation No. 1378 “On Measures to Realize the Federal Law on State Registration of Rights to Immovable Property and Transactions With It,” sec. 1 (November 1, 1998).

<sup>41</sup> Draft Registration Law of the Kyrgyz Republic, *supra* note 22. The draft is currently before the Kyrgyz Parliament and is expected to be adopted soon.

<sup>42</sup> *Id.* art. 8.2-3.

<sup>43</sup> *Id.* art. 8.4-5.

property.”<sup>44</sup> Article ten of the draft law pertains to local registration organs, including the requirement that each local registration organ shall create a data base on objects and subjects of immovable property, which shall become a part of the national information system on immovable property of the *Gosregistr*.<sup>45</sup>

Article 11 of the draft law empowers the organs of the registration system to require any person or legal entity to make any documents or information relating to a right or restriction of a right to immovable property to be registered available to the registration system.<sup>46</sup>

Lack of skilled staff with cadastral experience has been a problem in many ECA countries, particularly at the early stages of development of land registration systems.<sup>47</sup> Training and education play an important role in the establishment and development of a land registration system. The establishment and maintenance of the system requires a large number of specialists with both formal training and practical experience. A 1972 United Nations report identified several general needs for training that may provide guidance for ECA countries.<sup>48</sup> First, high-level policy makers sometimes require short-term training in the fundamental aspects of a land title registration system. Second, high-level administrative and professional staff could benefit by observation of land title registration programs in other countries. Third, professional personnel should have the opportunity to receive mid-career training in the form of periodic seminars for the purpose of broadening their outlook and keeping up on current developments.

#### **G. Lack of Public Access to Land Registry Information**

As in most cases, the law can either be a help or a hindrance in this area. Provisions in registration laws that restrict public access to information are problematic. If access is limited, the long-term integrity of the land registry system may be threatened. Moreover, the registry's usefulness as a source of land market information remains unmet if public access is limited. In addition to any direct limitation on access, there should be concern over any charge for access, beyond at most a nominal fee for clerical assistance or other costs incurred by the registration office in providing help.

An example of a law that avoids this pitfall is the Land Registration Law of the Russian Federation, which permits liberal public access to information in the register. Generally, any individual who files a written request and presents identification documents may receive

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<sup>44</sup> *Id.* art. 9.1.

<sup>45</sup> *Id.* art. 10.3.

<sup>46</sup> *Id.* art. 11.1.

<sup>47</sup> See Gray, *supra* note 27.

<sup>48</sup> See PETER F. DALE & JOHN D. MCLAUGHLIN, LAND INFORMATION MANAGEMENT 195 (1988).

information about immovable objects, the registered rights to them, and limitations on those rights.<sup>49</sup>

Under the Russian registration law, access to right-establishing documents in the files is more restrictive than the access to the register. Only limited categories of persons can obtain information concerning the documents themselves.<sup>50</sup> These categories include rightholders, individuals who have power of attorney issued by rightholders, heads of local and regional governments, tax authorities, courts, law-enforcement agencies, and rightholders' heirs.<sup>51</sup>

The draft registration law of the Kyrgyz Republic requires that the information in the state registration is open to the public,<sup>52</sup> and affirmatively requires the state registration organ and its subordinate offices to provide information regarding the registration and registered rights of immovable property to any person.<sup>53</sup> The only exception to this requirement is that documents and information containing state secrets do not have to be provided to the public.<sup>54</sup> The draft law, however, does not define the scope of "state secrets," so it is unclear whether this exception impedes public access to the land register. Procedures and amounts for fees that may be charged for provision of information services are to be established by the state registration organ, the *Gosregistr*.<sup>55</sup>

Timeliness of access is also an important issue. Under ideal circumstances, immediate access to the register should be granted to any individual who can establish a right of access. If immediate access is not possible due to administrative or personnel constraints, the delay between a request for information and the provision of access or information should be minimized.

The Draft Registration Law of the Kyrgyz Republic does not contain specific provisions governing the timeliness of access to the register. Nothing in the law, however, suggests that immediate access to the register is prevented.

Under the Land Registration Law of the Russian Federation, the Registrar has up to five days to provide the applicant with either the requested information or a written refusal, which can

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<sup>49</sup> Law of the Russian Federation No. 122-FZ "On the State Registration of Rights to Real Estate and of Transactions With It," art 7.1 (July 21, 1997).

<sup>50</sup> *Id.* art. 7.3.

<sup>51</sup> *Id.* art. 7.3.

<sup>52</sup> Draft Registration Law of the Kyrgyz Republic, *supra* note 22, art. 23.1

<sup>53</sup> *Id.* art. 23.2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* art. 23.3.



be appealed in court.<sup>56</sup> A five day delay may be necessary during the early stages of development of Russia's registration system, where the level of administrative capacity and individual expertise of those within the registry office may require more time to locate and provide information accurately. Furthermore, a delay of this magnitude is unlikely to create a significant impediment to registration. As the registration becomes more sophisticated, however, it should attempt to reduce the time required to provide information to the public. The Russian law requires registry officials to note all requests for information, and right holders may find out who has inquired about their immovable objects.<sup>57</sup>

In Kazakhstan, the Decree on Public Registration of Property Rights and Transactions in Real Estate allows the registry office ten days within which it may provide data on registration and registered property rights to the public.<sup>58</sup> A delay of this duration should not be necessary for the provision of information, and has the potential to discourage the registration of some real estate transactions.

#### **H. Complex Requirements for Land Descriptions and Land Surveys**

Land registration laws or land cadastre laws typically provide for a standard of land description in order for a parcel to be registered. The required standard can necessitate a complex and expensive survey. An over-emphasis on accuracy can become an impediment if it prevents landholders from registering their parcels because of high survey costs. The choice among land description requirements and related surveying methods generally involves balancing costs and accuracy. This choice is too often driven by what is technically possible, rather than what is economical, necessary, or likely to facilitate a land registry with comprehensive coverage of all or nearly all land parcels.

Fortunately, a highly reliable and successful registration system can usually be achieved by using a relatively simple description of the land plot's size and boundaries. This is particularly true for rural areas. Even in Australia under the Torrens system, which is often associated with precision surveys, a seller of land is not normally obliged to supply the purchaser with a plan or have a survey made. If the seller is able to provide a sufficient and satisfactory means of identifying the land parcel and if she can do so without the use of a plan, the purchaser cannot insist upon a plan being supplied.<sup>59</sup>

The choice in some ECA countries has also been affected by the level of detail historically maintained by the government. In many ECA countries, the government kept extremely detailed land information during the socialist era to assist with central economic planning. This high level of detail is not normally needed for purposes of registering legal rights,

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<sup>56</sup> RF Registration Law, *supra* note 23, art. 7.2.

<sup>57</sup> *Id.* art. 7.4.

<sup>58</sup> Republic of Kazakhstan Registration Decree, *supra* note 18, art. 22.2.

<sup>59</sup> P.F. DALE, CADASTRAL SURVEYS WITHIN THE COMMONWEALTH 47 (1976).

and should not become the minimum standard established in law in order for a parcel to be registered.

In Russia, the Land Registration Law does not establish a specific, high standard for land descriptions, and allows for registration of a land plot if a layout of the plot is submitted which contains a “detailed description of the boundaries.”<sup>60</sup> Requirements for land descriptions in other previous and current draft Russian laws ranged from the “simple boundary drawings” required under Presidential Decree Number 1767,<sup>61</sup> to provisions contained in the current draft Land Code requiring “a topographical plan (in a scale convenient for use) which shows, within the boundaries of the given land plot and with the aid of signs and symbols used in land use planning, the complete situation and relief as of the date of the latest survey in compliance with the latest land use planning project.”<sup>62</sup> For the purposes of registering agricultural land rights, the level of detail specified in the latter provision is unnecessary.

The Draft Registration Law of the Kyrgyz Republic provides an example of the type of boundary description requirements appropriate for ECA countries. The law’s strength derives from its establishment of a low initial threshold for boundary descriptions coupled with specific procedures for introducing more detailed descriptions where deemed necessary by the state or desirable by the land right holder.

Article 25 of the draft law allows the boundaries of immovable property units to be either fixed or approximate.<sup>63</sup> As a rule, however, the approximate boundaries are sufficient for entry in the registration index map.<sup>64</sup> Where fixation of boundaries is deemed necessary, it may be initiated by either the registration organ or the holder of rights to the immovable property unit.<sup>65</sup>

The draft law further specifies the procedures for the fixation of boundaries to immovable property. If the registration organ determines that it is necessary to fix the boundaries of any immovable property, it must first notify all parties whose property may be affected by the action to fix the boundaries.<sup>66</sup> After hearing all interested parties, the registration organ may then fix the boundaries by a topographic survey performed by a natural person or legal entity licensed for

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<sup>60</sup> RF Registration Law, *supra* note 23, art. 18(4).

<sup>61</sup> Decree of the President of the Russian Federation No. 1767 “On Regulation of Land Relations and Development of Agrarian Reform in Russia,” (October 27, 1993) [hereinafter RF Decree No. 1767].

<sup>62</sup> Draft Land Code of the Russian Federation, art. 71.1 (June 11, 1997) (*adopted by the Federal Assembly in 1997*).

<sup>63</sup> Kyrgyz Registration Law, *supra* note 22, art. 25.1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* art. 25.2-5.

<sup>66</sup> *Id.* art. 25.3.

geodetic works, make appropriate changes in the registration index map, and file a copy of the survey plan in the registration folder.<sup>67</sup> If the property right holder initiates the fixation of boundaries to immovable property, he is required to bear all expenses.<sup>68</sup>

The Kazakh Registration Decree follows the same general approach as the Kyrgyz registration law, making it clear that a topographic plan may be used, but not requiring it under the law.<sup>69</sup> Unlike the Kyrgyz law, however, the Kazakh decree fails to contain provisions governing the procedure for developing detailed topographical plans.

### **I. Lack of Reliable Compensation for Losses Caused by Government Error in Registration**

Establishment of legal liability for material mistakes by the registration agency and an assurance fund to compensate those damaged by such mistakes are important components of most land title registration systems. Land registration laws should contain provisions specifying when the state is liable for registry errors. The laws can also provide for a state assurance fund to compensate those damaged by registration mistakes when the registration agency is liable. Assurance funds provide security to landowners by compensating parties who suffer damages due to mistakes by the registrar and exist in most, but not all, countries with title registration systems.<sup>70</sup> Due to the investment required in establishing assurance funds, however, ECA governments considering the adoption or reform of title registration systems may be reluctant to assume liability for mistakes committed by the registry office.

The Land Registration Law of the Russian Federation does not establish an assurance fund from which the state would compensate those who lose their land rights due to error. Under the law, injured persons have the right to recover directly from the parties that caused their injuries.<sup>71</sup> Article 31.2 of the law holds persons liable for any damage they cause to any party by

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<sup>67</sup> *Id.* art. 25.4.

<sup>68</sup> *Id.* art. 25.5.

<sup>69</sup> Republic of Kazakhstan Registration Decree, *supra* note 18, art. 9.2.

<sup>70</sup> See THEODORE B. F. RUOFF, AN ENGLISHMAN LOOKS AT THE TORRENS SYSTEM (1957). Ruoff suggests that three principles are fundamental to the success of land title registration, one of which is the insurance principle: that is, that the registry compensate any party suffering damages as a result of mistake in the register. *Id.* at 13. The other two principles are: (a) The mirror principle, involving the proposition that the register reflects accurately and completely the current facts material to land title; and (b) The curtain principle which provides that the register is the sole source of information for potential purchasers who need not concern themselves with interests which lie behind the curtain. *Id.* at 8, 11. While most title registration systems include assurance funds, some countries have adopted and operate efficient title registration systems without assurance funds. These countries include Germany, Malaysia, and Fiji. Simpson, *supra* note 17, at 181.

<sup>71</sup> Leo S. Batalov, *Russian Title Registration System for Realty and its Effect on Foreign Investors* UNIVERSITY OF WASHINGTON LAW REVIEW (1998).

“intentional or unintentional distortion or loss of information related to the rights to immovables and real estate transactions registered.”<sup>72</sup>

In contrast to the Russian approach, Chapter Seven of the Draft Registration Law of the Kyrgyz Republic does establish a state assurance fund and clarifies when the state is liable for registry errors. The additional provisions of Chapter Seven (described below) provide a model of related legislative requirements for the establishment of a state assurance fund.

The Kyrgyz assurance fund will be established under the federal registration organ, the *Gosregistr*, to compensate actual losses or damages sustained by any natural person or legal entity due to the following reasons: (a) erroneous information contained on a registration card or in an official document issued by a registration organ; and (b) inaccuracy, mistake, or deliberate malfeasance in the performance of the duties of officers of the registration system.<sup>73</sup> All claims against the assurance fund shall be heard by a court after preliminary consideration of the claim by bodies of the registration system.<sup>74</sup> The amount of losses suffered is calculated based on the value established as of the time the claim is made, and not as of the time of registration, and all claims for losses are based on independent appraisal of losses.<sup>75</sup> Officers of the registration system are not held financially liable for errors or inaccuracies occurring in the good faith performance of their duties, but are held liable for any deliberate malfeasance, abuse of their authority, or other criminal activity in accordance with legislation of the Kyrgyz Republic.<sup>76</sup> All claims against the assurance fund must be brought within three years of the date upon which the claim arose.<sup>77</sup>

Article 34 of the draft law establishes a series of specific exceptions to the liability of the state registration system. Under these provisions, the assurance fund is not liable for losses caused by the claimant's own negligence, caused by mistake or inaccuracy of a notary, or based upon an error in a boundary survey or description.<sup>78</sup> Under the above circumstances, the claimant must recover losses from the responsible party to the extent permitted under other legislation of the Kyrgyz Republic.<sup>79</sup>

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<sup>72</sup> RF Registration Law, *supra* note 23, art. 31.2.

<sup>73</sup> Draft Registration Law of the Kyrgyz Republic, *supra* note 22, arts. 35, 32.1.

<sup>74</sup> *Id.* art. 32.1.

<sup>75</sup> *Id.* art. 32.2-3.

<sup>76</sup> *Id.* art. 32.4.

<sup>77</sup> *Id.* art. 33.

<sup>78</sup> *Id.* art. 34.1

<sup>79</sup> *Id.* art. 34.2.

Article 36 allows the assurance fund to recover damages from any individual who, through negligence, fraud, or other criminal acts causes damages that are reimbursed by the assurance fund.

Several approaches can be adopted to ease the financial burden associated with the government's creation of a state assurance fund. One such approach is to use registration fees to help build up an assurance fund. This approach will require some amount of initial government investment, as an assurance fund solely dependent on registration fees is initially inadequate since the fund will be vulnerable to claims before it has had time to build up.<sup>80</sup> Another approach is to delay the introduction of an assurance fund until a later stage of registration when registration fees have accumulated to a level that can maintain such a fund without additional government investment. This approach has been adopted by Moldova, where the 1998 Law on Real Estate Cadastre calls for the creation of an assurance fund, but actual creation of such a fund is unlikely in the near future.<sup>81</sup>

Generally, assurance funds are used to compensate persons who suffer losses because of a mistake made by registry personnel. However, entitlement to compensation can depend on the type of mistake or the category of persons who suffer loss. In some countries, for example, legislation expressly excepts from indemnity damage that results from mistakes or omissions concerning the initial registration of a land plot. The experience of most countries has shown that claims against the assurance fund are infrequent and insubstantial,<sup>82</sup> although there are exceptions.<sup>83</sup>

Regardless of the timing and approach for the establishment of a state assurance fund, the law governing registration should identify the agency or agencies responsible for the introduction of assurance funds and the time limit for the responsible agency to submit procedures for establishing such funds. The law should also contain provisions limiting compensation in the event of a mistake. Where a mistake has been committed but the register does not require correction, compensation should not exceed the value of the interest at the time the mistake or omission was made. Where the register does require correction, compensation should not exceed the value of the interest immediately before the time of correction. The law should also provide

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<sup>80</sup> Simpson, *supra* note 17, at 28, 181.

<sup>81</sup> E-mail communication with Robert Mitchell, Legal Team Director, United States Aid for International Development Moldova Land Registration and Titling Project, July 6, 1998.

<sup>82</sup> Simpson, *supra* note 17, at 180.

<sup>83</sup> Two cases from the United States experience with the Torrens system are perhaps the most notable exceptions. In California in 1918, a couple bought land on the strength of a Torrens certificate which failed to disclose a mortgage of \$55,000. After 19 years of litigation the couple obtained a judgment for \$48,000, only to find the assurance fund contained only \$39,000. *Gill v. Frances Inv. Co.*, 19 F.2d 880 (C.C.A.9 (Cal.), May 23, 1927) (NO. 4997). *See also* RICHARD R. POWELL, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK 98 (1938). Likewise in Nebraska in 1929 there was only \$182 in the assurance fund to satisfy a judgment against it of \$19,890. *Jones v. York County, Neb.*, 26 F.2d 623 (C.C.A.8 (Neb.), May 14, 1928) (NO. 8010).

a procedure for claiming compensation and should expressly provide that the government may recover its loss from each person who actually caused it.

### III. Land Registration Systems: Comparative Examples

This section introduces two competing approaches to land registration. The first is the land recordation system as practiced in the United States. The second is the German Grundbuch, a model of land registration under a European civil law approach.

#### A. United States

The United States' land registration system is based on the registration of deeds, or *land recordation*.<sup>84</sup> Land recordation involves the registering or recording of documents affecting interests in land. It developed hundreds of years ago in several European countries to prevent double selling of land.<sup>85</sup> With registration or recordation of the deeds at a government office, the priority of claims could be established in the event of double selling. Each state has its own recordation law, all along the same general lines, and there is an extensive body of judicial interpretation.<sup>86</sup>

The primary functions of the land recordation system, as employed in the United States, are to provide a public record of land ownership<sup>87</sup> and to provide notice of the existence of

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<sup>84</sup> See *supra* Section II. B of this chapter for a discussion of registration of deeds versus registration of title.

<sup>85</sup> In settings without land registration systems, the process of conveying land is done without any recourse to public records, and is usually referred to as private conveyancing. When communities were small and close-knit, the physical transfer of a deed (or a twig) with several witnesses from the community was sufficient evidence of a land transfer and worked to safeguard not only the purchaser but also third parties from the community who might have interest in the land. Therefore, many early legal systems, and systems of customary law in less developed countries, have regarded publicity alone as sufficient guarantee when land is transferred. However, as societies have become less close-knit and more complex, this process of private conveyancing becomes less satisfactory. Purchasers and other interested parties need to be able to inquire into a purported owner's rights to the land. The most important risk to avoid, from a purchaser's perspective, was that of buying land from a landowner who had already transferred interest to another person. Banks or other potential mortgagees located outside the immediate community are in a similar position with respect to avoiding risk.

<sup>86</sup> In the classic example, if landowner A sells his land to B and again later purports to sell it to C, then C will normally lose as against B if B had immediately recorded his deed from A or B had immediately gone into possession of the land. Either recordation or possession is said to put C "on notice" of B's prior rights. C can only sue A to get his money back. However, if B has neither recorded his deed nor gone into possession, C usually wins and gets the land. B must then sue A to get his money back. See generally GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 972-990 (1996).

<sup>87</sup> Although the references made here to the system in the United States and other countries with private land ownership are to recordation, registration, and transfer of "ownership," these references would be generally applicable to a system in which the maximum private rights permitted with respect to land were something less than ownership.

certain continuing interests, encumbrances, and claims.<sup>88</sup> The United States' land recordation system makes no averments to the public about the state of the title to any parcel of land. Instead, it simply invites searchers to inspect copies of documents that it contains and to draw their own conclusions as to title.<sup>89</sup>

To assert or to protect an interest in property under the recording system, the claimant must file a document describing that interest with the public recorder's office, usually maintained at the county level. The submitted document -- for example, a deed -- is then recorded in an index that is typically an alphabetical grantor-grantee index, thus providing notice of that interest to all the world.<sup>90</sup>

A typical registered deed contains the following: (a) the names of the grantor and grantee; (b) the amount of consideration paid for the property; (c) a description of the property; (d) a statement of exceptions to the title assumed by the grantee; (e) the date of the transaction; (f) a certificate of acknowledgment by a notary public; (g) the stamp of a state public official acknowledging that the deed has been registered; and (h) stamps indicating that all recording fees and all applicable taxes have been paid.<sup>91</sup>

Legal requirements for land descriptions in most states can be met in a variety of ways. Most state property conveyancing acts contain general language merely requiring a "legal description of the property."<sup>92</sup> In practice, this requirement can be satisfied through a variety of methods, including: (a) a description of "metes and bounds";<sup>93</sup> (b) reference to a government land survey, such as the Federal Survey; and (c) plat maps.<sup>94</sup>

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<sup>88</sup> Goldner, *supra* note 15, at 663.

<sup>89</sup> Cunningham, *supra* note 13, at 774.

<sup>90</sup> Goldner, *supra* note 15, at 663. Complicated "notice" issues arise when the document has been submitted and placed in the records but an erroneous entry (for example, a misspelled name) has been placed in the alphabetical index by a recording office official. In the event that the issue of notice subsequently arises, such subsidiary questions are normally resolved by a court.

<sup>91</sup> Nelson, *supra* note 86, at 905-7.

<sup>92</sup> See e.g. COLORADO REVISED STATUTES sec. 38-35-122 (1997); MICHIGAN STATUTES ANNOTATED sec. 26.1286 (21) (1997).

<sup>93</sup> Metes and bounds is accomplished by starting with a known object on the property (a "monument") such as a tree, boulder, surveyor's stake, or fence, then pointing in a certain direction from it (a "course"), and indicating the distance that line is to follow, either in terms of measurement or by reference to a monument at the other end. This will provide the first boundary line. Then a new direction and length are given, to form the second boundary. This process is repeated until the final line terminates at the point where the first line began, enclosing the parcel. ROGER BERNHARDT, PROPERTY 221 (1991).

<sup>94</sup> The development of land into small parcels typically occurs through subdivision, which entails the subdivider preparing a street map of the new subdivision. Such a map shows both the streets to be laid out and the new parcels to be made available for sale. Once this map has been approved by the local government and recorded, all sales of the parcels are made with reference to the recorded subdivision map. *Id.* at 223.

Whenever an interest in property is transferred, a search must be made of all claims related to the parcel in question. The transferee (or the transferee's agent)<sup>95</sup> must undertake a complex and tedious<sup>96</sup> (and costly) search through the grantor-grantee indexes, and then read the documents revealed in such indexes (at least those from recent decades) to make sure the transferor does indeed possess the interest to be conveyed and no outstanding claims exist.

Obtaining a title insurance policy is the most common method of apprising the transferee as to the marketability of the title being acquired. Title insurance is a contract to protect an owner or lender against losses arising through defects in the title that affect their interest in property. Title insurance policies are written by private insurance companies that normally specialize in this type of insurance. Title insurance guarantees that the ownership of the property being purchased is as stated in the public records. A standard title insurance policy will insure only against those matters that are disclosed in the public record, and does not cover defects that are not of record or are concealed from the title company. For example, items such as encroachment that are found only by a survey or inspection of the property are not covered by a standard policy.

A title insurance company issues the policy when it is satisfied after its search of the records<sup>97</sup> that title is clear, and therefore assumes the transferee's risk of purchasing an impaired title. It is the "risk" inherent in recordation that creates the need for "assurance" that title is clear, and the title insurance company provides this assurance, although at a significant cost to landowners.<sup>98</sup> A new search has to be made, and a new title insurance policy issued and paid for each time, in case of successive sales of the same farm or land parcel.

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<sup>95</sup> In most United States jurisdictions, this complex and tedious search is performed by a title insurance company, an attorney, or an abstracting company. Lobel, *supra* note 15, at 504.

<sup>96</sup> One title insurance company lists 76 different sources of title information in 15 different offices that theoretically are necessary to check in order to determine the state of title. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT & VETERANS ADMINISTRATION HUD-F-5, REPORT ON MORTGAGE SETTLEMENT COSTS (1972) cited in Lobel, *supra* note 15, at 505.

<sup>97</sup> Title insurance companies typically maintain their own private set of the public land records, which they acquire by making their own copies of documents filed every day (the officially maintained land records, are, in most countries, fully open to the public and can be copied). Title insurance companies usually create their own parcel (or "tract") based index and other indexes to these documents to facilitate their search of the records.

<sup>98</sup> A study comparing the average cost of transferring a title in the recording system with the cost of title transfer in the Torrens system in one United States jurisdiction showed the costs in the recording system to be about twice as high. Janczyk, *supra* note 15, at 215-20. Largely as a result of the inefficiency of the recordation system, landowners in the United States paid about \$3.6 billion per year even as long ago as 1977. Joseph Janczyk, *Land Title Systems, Scale of Operating and Conversion Costs*, 8 JOURNAL OF LEGAL STUDIES 569, 569 (1979). The average cost for title insurance upon purchase of a \$150,000 single-family dwelling (\$120,000 loan) in Seattle in 1996 is approximately \$950. If the purchaser later refinances the home to obtain a more favorable interest rate, she will be subject to another title insurance fee of approximately \$300. Telephone conversation with Norwest Mortgage Loan Officer Bill Wetzel, April 23, 1996.



The principal problems with the United States' land recordation stem from the fact that this system provides only evidence concerning the status of rights to land, but is not conclusive. Any interested party is invited to search the evidence and make his or her own determination as to the status of land rights, but that determination is not a definitive determination of title. Thus, land recordation in the United States suffers from problems of inefficiency, insecurity of title, and high costs.

Some American states also have parallel, optional systems of registration of title (Torrens systems), but they have generally been little used. One basic problem has been that the law requires an expensive and time-consuming procedure to shift a parcel of land from the long-established deed registration system to the optional title registration system. For this reason, the option is sometimes availed of for valuable urban real estate, but rarely for farmland.<sup>99</sup>

## B. Germany

The German Land Register (*Grundbuch*) was introduced in 1897 under the Land Register Act (*Grundbuchordnung*).<sup>100</sup> The Act requires that all rights concerning land must be registered, so that the Land Register shows all real rights over property.<sup>101</sup> Registration is also required for the creation of servitudes, rights of way, restrictive covenants, land securities, mortgages, and rent charges.<sup>102</sup> Any proposed changes in the legal status of land or other property are invalid until the time of registration, whereupon they take immediate effect. The German registry follows the principle of title registration; that is, all entries in the register are *prima facie* evidence of the actual legal status of the land.<sup>103</sup>

The German Land register does not include changes that are not incurred by contract but are made under public law such as servitudes, covenants, or pre-emption rights for conservation or preservation areas. Despite their lack of documentation in the register, these changes remain legally valid. Therefore, an owner must make additional inquiries with local authorities before being certain that he may use land as he desires.<sup>104</sup>

The Register is administered and operated by lower level courts for the territory within their jurisdiction. Every plot of land has its own folio, and several folios are bound into one volume. The folios and volumes are numbered consecutively. Each individual folio consists of

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<sup>99</sup> See Nelson *supra* note 86, at 1002-04.

<sup>100</sup> NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS 285 (1996).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 285.

five parts: the heading, the reference list, and three “sections.” The heading contains the name of the court, the registration district, the number of the volume, and the number of the folio. The reference list is a list and description of the property itself together with all such absolute rights as are vested in the owner of the property as such and not in him personally (such as easements and servitudes), so that they pass over to any transferee of the property *ipso jure*.<sup>105</sup> The first of the three sections lists the current and previous owners of land and buildings. The second shows the rights of use in respect to land, such as building rights, servitudes, usufructs, and land charges. The third concerns security interests in land and their priorities.<sup>106</sup>

Although the register is only open to public inspection by individuals who can show a legitimate interest, broad interpretation of this rule creates a relatively large class of interested parties. This class includes anybody for whom a right is registered or who has a claim to be registered as the holder of a right or who is a creditor of a person who holds a registered right. Public authorities and notaries are presumed to have an interest in inspecting the register.<sup>107</sup>

#### **IV. Checklist of Potential Legal Impediments and Solutions**

This section provides a list of potential legal impediments to the development of an effective land registration system in ECA countries. Each impediment is followed by potential solutions gleaned from comparative experience. The potential solutions must, of course, be viewed within the context of each country’s general legal and institutional framework as well as the country’s customary law. Not all solutions will be appropriate for every ECA country.

##### **Potential Impediment: Legal rules are nonexistent or insufficient.**

A detailed set of rules and procedures clearly defined in law are a prerequisite for any land registration system.

##### **Potential Solution**

- Specific legislation should be drafted containing detailed rules and procedures governing land registration (for a checklist of items to be included in such legislation, see *infra* Section V of this Chapter).

##### **Potential Impediment: The registry does not provide conclusive evidence of title.**

The failure of the land registry to provide conclusive evidence of title can impede land transactions by necessitating a complex, time-consuming, and costly search of all claims related to the parcel in question by the transferee or the transferee’s agent.

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<sup>105</sup> E. J. COHN, *MANUAL OF GERMAN LAW* 191 (1968).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 190.

### **Potential Solutions**

- Adopt a system of title registration, in which the registry reflects conclusive evidence of title, instead of deed registration.
- Legal provisions governing registration should explicitly state that the land register is conclusive evidence of title.
- Even under a registration of deeds system where the register does not contain conclusive evidence of title, the register should contain enough information, and be organized in a fashion (for example, with a parcel or "tract" index, and not just a grantor-grantee index) so that it is relatively easy to determine the state of title for each parcel in the register.

### **Potential Impediment: The legal status of unregistered land rights and restrictions is unclear.**

Even in land title registration systems, certain land rights and restrictions are typically considered legally valid even if not registered, such as tax liens and general land use regulations. Lack of specific clarification concerning what rights and restrictions are valid without registration makes registry information less useful, contributes to tenure insecurity, and impedes land transactions. A related problem is that land rights that have arisen prior to existing registration law and are not registered according to that law may have unclear legal status.

### **Potential Solutions**

- Laws governing registration should include a specific list of rights and restrictions that are legally valid even if not registered.
- Laws governing registration should include an explicit provision that land rights that arose prior to the registration law's effective date remain legally valid. The law should also provide or recognize a process to bring such rights within the newly created registration system.

### **Potential Impediment: Registration and titling processes are slow.**

Significant delays in issuing and registering land titles can deter land market development.

### **Potential Solutions**

- Laws governing registration should establish time limits for actions by all registration officials, with suitable penalties for failing to meet such time limits.

- Maintain adequate registry personnel to process transactions.
- Mandate the use of standardized forms in all land register transactions to increase the speed of the registration procedure while simultaneously reducing the possibility of mistake.

**Potential Impediment: High registration fees create disincentives to registration.**

High registration fees discourage landholders from registering their land.

**Potential Solutions**

- After a land registry has been established, registration fees should be set at a fixed, low level to help support the operation and maintenance of the system. The goal should be to establish an administrative system that is economical enough to break even while keeping fees at a level that will not discourage transactions. Such fees may be based on the land value so that bigger transactions subsidize smaller ones, or they may be on a fixed basis.<sup>108</sup>
- Limiting the information contained in the registry to that which is absolutely essential, such as parcel descriptions, ownership, and other interests in the immovable property will also help to minimize costs and keep registration fees low.

**Potential Impediment: Institutional shortcomings include no clearly identified registration agency, lack of inter-agency coordination, and lack of institutional capacity.**

Clearly identifying a registration agency, facilitating necessary inter-agency coordination, and establishing institutional capacity and communication are essential to the effective establishment and maintenance of a land registry.

**Potential Solutions**

- Legal provisions should clearly specify the powers and responsibilities of all agencies involved in land registration. Ideally, a single, central agency providing policy and direction in land and property systems should be given responsibility for the establishment and maintenance of the land registration system.
- Legal provisions should require all government agencies to deliver files requested by the registration agency in a timely manner.

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<sup>108</sup> See SIMPSON, *supra* note 17, at 301, 302.

- A system should be developed and enacted into law under which the registration agency is automatically informed of all transfers or successions handled by courts, notaries, and local and central authorities. This is especially important in the case of inheritance, as there is otherwise a significant risk that such changes in ownership will not be reported. Likewise, it would be helpful if the taxing authorities notified the registrar of all tax liens placed on land, so the registry office could contain a list of all such liens for notice purposes only.<sup>109</sup>

**Potential Impediment: The public does not have access to land registry information.**

The benefits of a land register in developing land markets can only be realized if the public has access to the records contained in the register.

**Potential Solutions**

- The registration law should require the registry information to be open to public inspection and otherwise available to the public without significant delay.
- The workings of the land register should also be simple enough that members of the general public can easily ascertain all relevant information from the register upon inspection. Any fees for provision of assistance should be low and limited to covering direct costs.

**Potential Impediment: Requirements for land descriptions and land surveys are complex and burdensome.**

Unnecessarily high or detailed standards for land descriptions that necessitate unnecessarily complex and expensive land surveys prevent inclusion of all parcels in the registry, limiting the registry's effectiveness.

**Potential Solutions**

- The choice among land description requirements and related surveying methods should be based on what is economical, necessary, and likely to facilitate a land market with comprehensive coverage of all or nearly all land parcels rather than on what is technologically possible.
- The desired level of accuracy for land descriptions should enable the boundaries to be relocated in cases of dispute or uncertainty, enable subdivision to take place within or up to the limit of the existing parcel, and (for a multi-purpose cadastre) enable planners and assessors to calculate areas. It should be recognized that lesser levels of

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<sup>109</sup> Note that such liens need not be (and typically are not) entered into the register. Tax liens are usually overriding interests, but the registry office could contain a list of tax liens to provide notice to potential purchasers.

accuracy are likely to be needed for agricultural lands than are needed in urban settings.

**Potential Impediment: Lack of reliable compensation for losses caused by government error in registration limits the effectiveness of a registration system.**

Mistakes are certain to happen, and the absence of clear liability and reliable compensation will impede confidence in the registration system and provide an incentive for landowners not to register their land.

#### **Potential Solutions**

- Registration laws should specify the situations when the state will be liable for material mistakes made by the registration agency.
- Registration laws should provide for the creation of a state assurance fund to compensate parties who suffer damages due to mistakes by the registrar.
- The law should further contain procedures for claiming compensation from the fund and the type of compensation for which the claimant is eligible.

#### **V. Items to be Included in a Land Registration Law and Implementing Regulations**

1. Explicit recognition that the register reflects the ultimate legal status of the registered property, with appropriate limited exceptions such as possessory interests.
2. A specific list of rights and encumbrances that must be registered.
3. A list of “overriding interests,” or rights and restrictions that are valid whether or not they have been registered.
4. Provisions creating a uniform registration system at the county (or comparable) level.
5. Mandatory title registration for immovables.
6. Registration of land shares.
7. Ownership subject to registered interests listed on registration certificate.
8. Leases of three years or less need not be registered.
9. Designation of a single registration agency for all immovables and statement that registration at other agency does not affect title registration.

10. Definition of the responsibilities of registration officials and rules governing the delegation of powers.

11. Specific procedures for maintaining records, including:

- (a) Organization of all records into files, with one master file per land plot containing a subfile for each occupying structural immovable;
- (b) A unique certificate number for each certificate given to each owner of each immovable;
- (c) A unique cadastre number for each separately owned immovable, which in the case of a structural immovable shall relate to the land plot occupied, and, in the case of an apartment, shall relate to the building occupied;
- (d) Contents of instruments for transfer, exchange, lease, mortgage, and easement;
- (e) Registration of apartments;
- (f) Correction of records and limitation statute;
- (g) Electronic records vs. written records;
- (h) Receipt book and pending applications;
- (i) Termination of registered rights;
- (j) Proof of identity;
- (k) Agent for notice by non-resident;
- (l) Time limits for action by registration official;
- (m) Replacement of lost certificates;
- (n) Microphotographing certificates and instruments;
- (o) Violation of ceiling limits;
- (p) Registration after forced sale;
- (q) Fees; and
- (r) Penalties.

12. List of exclusive reasons for refusing registration of immovables ownership.

13. Court jurisdiction over claims and disputes.

14. Standard State Certificate of Land Ownership and other standardized registration forms.

15. Provision requiring that original of State Certificate of Land Ownership to be filed at the registration office; owner to receive owner's copy.

16. Mandatory, automatic registration of future grants of public immovables to private persons.

17. No perimeter drawing or land plan required to register initial grant of land plot or initial grant of structural immovable.
18. Status of rights embodied in old certificates conveying rights to land plots remain valid and may be registered.
19. Legal rights of non-registered possessors.
20. Other government agencies shall deliver files requested by registration agency.
21. Ownership must be registered in order to transfer, mortgage, lease, or create some other interest in an immovable.
22. No other interest in an immovable can be registered until ownership of the immovable has been registered.
23. Registration may include both indefinite (permanent) use rights, or temporary use or lease rights granted by the state or municipality.
24. Registration agency liable for damages arising from errors, including negligence.
25. Provisions specifying when state is liable for registration errors.
26. Provisions creating an assurance fund and detailing its operation.



# Land Taxation

by Jennifer Duncan

## I. Introduction

Enacting an effective land taxation system contributes to the establishment and maintenance of private land markets in several ways. First, land tax is an important vehicle for transferring some of the benefits of land privatization to the public sector. In almost all of the ECA economies, local governments now have, or are expected rapidly to assume, responsibility for some, many, or even all of a daunting list of activities which includes: local roads, utilities, social welfare, major infrastructure, pensions, unemployment, health, and education. Revenues from land tax can fund significant and increasing portions of these services, fostering public and local government support for privatization.<sup>1</sup>

Second, a well-balanced land tax structure can assist in the smooth functioning of a land market. A high land tax in ECA countries may force small farmers operating close to the margin and pensioners to sell their land to agricultural enterprises or wealthier farmers, leading to consolidation of large tracts of land in the possession of a relatively small number of people. Also, high taxes (or the perception of high taxes) may discourage members from leaving large collective or state farms to start small private farms, thus stalling farm restructure. On the other hand, under-collection of taxes can undermine the goals of land tax reform and create inequities between taxpayers.

The purpose of this chapter is to set forth the legal impediments to effective land taxation in ECA countries and to describe the approaches that countries with developed land taxation laws have taken to address these challenges. Section II sets forth impediments, followed by comparative approaches in Section III. Section IV contains a checklist of impediments paired with potential solutions, and Section V contains a checklist of general principles to be included in legislation governing land taxes. The present chapter also discusses, in addition to legal impediments to land taxation, certain other land-related tax issues which pertain to land transfers.

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<sup>1</sup> Land tax is "of particular importance for the survival of the financial autonomy of local self-government." E. Lipinsky, *The Functions of Taxation and Farm Credit in Agrarian Reforms and Land Tenure Systems in EEC Member Countries*, in *LAND REFORM AND THE PROBLEMS OF LAND LEGISLATION* (International Seminar of the All-Union Academy of Agricultural Sciences, Food and Agriculture Organization of the United Nations) 253 (Moscow, June 10-14, 1991); see also Anders Müller, *Agricultural Land Tax and the Transition to a Market Economy*, in *AGRICULTURAL LANDOWNERSHIP IN TRANSITION ECONOMIES*, 127-46 (Gene Wunderlich ed., 1995).

## II. Land Taxation Impediments and other Land-Related Tax Issues in ECA Countries

Legal impediments to effective land taxation in ECA countries include laws or regulations which provide for or allow: (a) inaccurate and inequitable valuation; (b) ineffective distribution of revenues; (c) over-taxation; (d) exemptions and preferences; (e) inadequate focus on collection; (f) high transfer taxes; (g) high capital gains taxes; and (i) excessive inheritance taxes. This section discusses each of these impediments as it applies to ECA countries.

### A. Inaccurate and Inequitable Valuation

The scarcity of accurate information on market values in many ECA countries impedes the establishment of an effective land tax. Although some ECA countries are beginning to generate land market values, these countries often lack the registration and cadastre systems needed to adequately record this data for purposes of valuation. Commentators have cited the following prerequisites to the creation of an effective, equitable tax: (a) a comprehensive property tax law; (b) an official record (or cadastre) on each tract which includes information on the size, value, ownership, and productive capacity of each parcel; and (c) administrative capacity to update the cadastre, assess, collect and enforce the tax.<sup>2</sup> Failure to adopt a land registration or cadastre system hinders the development of an accurate and equitable land tax.<sup>3</sup>

Due to a paucity of market information, tax laws and regulations in many ECA countries have used area, soil quality or some other factor rather than market-based valuations for land taxation.<sup>4</sup> Area-based values are flat rates per square meter or square hectare which vary by region.<sup>5</sup> Area-based values are usually outdated and grossly undervalued, and can be inequitable to the extent they fail to incorporate appreciation in areas of recent development. Area-based values vary in accuracy; the most inaccurate may be those generated from a single variable. In Czechoslovakia the only factor in valuing land was soil quality.<sup>6</sup> In Ukraine, the 1992 Tax Law

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<sup>2</sup> HANS P. BINSWANGER ET AL., POWER, DISTORTIONS, REVOLT AND REFORM IN AGRICULTURAL LAND RELATIONS 69 (World Bank Working Paper No. WPS 1164, 1993).

<sup>3</sup> One of the most important reasons to establish a land titling and registration system as soon as possible in a transitioning economy is to lay the basis for a land tax. Dennis Robinson, *Interactions Between Land Policy and Land-Based Tax Policy*, 11 PROPERTY TAX JOURNAL 125, 133 (1992). For a discussion of impediments to land registration in ECA countries, see Chapter 9, *Land Registration*.

<sup>4</sup> See, e.g., Decree of the President of the Russian Federation No. 1204 "Procedure for Determining the Normative Value of Land" (March 3, 1994).

<sup>5</sup> According to Tajikistan law, for example, "The rate of the land tax does not depend on results of economic activity of land users and it is established in the form of the stable payments for land square units. . ." Law of the Republic of Tajikistan No. 449 "On Payment for Land" (May 15, 1997).

<sup>6</sup> Thomas A. Reiner & Ann Louis Strong, *Formation of Land and Housing Markets in the Czech Republic*, 61 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 200, 207 (Spring 1996). The average land tax in Czechoslovakia prior to 1993 reforms was \$53/ha. The amount actually collected may have been much lower. Despite legal provisions for valuations based on land quality, one single rate would often be applied to an entire village. Local authorities could decrease the rate by 50%. During fieldwork in 1992, the Rural Development

established tax rate (valuation) tables based solely on land quality which, according to observers, yielded arbitrary effective rates.<sup>7</sup>

The paradox for ECA countries is that legal provisions for market-based valuations for agricultural (or other) land cannot be introduced, or used for taxation purposes, unless and until land markets begin to function in those countries. At the very least, lease markets for land must be functioning, and preferably land sales must be permitted and occurring. Otherwise, one might risk setting taxes at unrealistically high levels based on wrongly-inflated valuation levels.<sup>8</sup>

In the absence of accurate market information, ECA countries have tried a variety of legal approaches to valuing land. Estonia implemented a revised land tax law in 1993 to correspond with the transition to a market economy. Under the new rules, the government taxes land based on "market values" of similarly-situated land. Rather than individually valuing all plots, the government begins with an estimated market value per square meter for various land classifications.<sup>9</sup> Because the land market is still in its infancy, valuation is based on models

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Institute visited two cooperative farms where no land tax was collected at all; farmers said this was not uncommon. See ROY PROSTERMAN & TIM HANSTAD, *An Analysis of the Czechoslovakian Land Reform Process from a Comparative Perspective*, 24 (February 1992) (unpublished paper prepared for agricultural roundtables by Agricultural Cooperative Development International and the Global Economic Action Institute, on file with the Rural Development Institute).

<sup>7</sup> Ukraine's 1992 Law on Payment for Land established tax valuation tables based on land quality per hectare. "Normative prices" for land transactions were derived from these tax tables. According to observers, this approach to valuation yielded both arbitrary tax rates and arbitrary normative land prices. CSABA CSAKI & ZVI LERMAN, *LAND REFORM IN THE UKRAINE, THE FIRST FIVE YEARS*, 19 (World Bank Discussion Paper No. 371, 1997).

<sup>8</sup> In some regions of Russia, for example, officials have been overly optimistic in estimating market values for agriculture land. While auctions of municipally owned commercial land in *Saratov Oblast* in 1998 brought higher than expected prices from private bidders, the prices paid for agricultural land were generally much lower than originally expected. At an auction on April 18, 1998 in *Rtishchevo, Saratov Oblast*, four agricultural land plots were offered at auction but only one sold. Leonard Rolles and Greg Mohrman, *Notes from Field Research Trip in Saratov Oblast, Russia*, 8 (May 19, 1998) (unpublished memorandum on file with the Rural Development Institute). At an auction in *Balakovo, Saratov Oblast*, in March 1998, agricultural land plots valued at 112,000 rubles sold for 30,000 rubles in one case and 500 rubles in another. Bronnyn McLaren, *Russia Holds First Sale of Private Land*, *MOSCOW TIMES*, March 6, 1998; BBC SUMMARY OF WORLD BROADCASTS, March 7, 1998 (the *Balakovo* auction on March 5, 1998 was a success except for agricultural land sales; only 2 out of 3 of the plots at auction sold, both for lower prices than expected).

<sup>9</sup> The Law of Land Valuation of 1993 set forth the details of valuation for land taxation. This law was revised in 1994 and amended by Governmental Decree No. 36, issued on January 24, 1995. As amended, the valuation law establishes four class of land: urban, agricultural, forest and other. The government first assigns a base price for each class, second assigns zone values of land, and third identifies adjustment factors to distinguish variations between parcels. ATTILIO F. OTT, *LAND TAXATION AND TAX REFORM IN THE REPUBLIC OF ESTONIA* 5 (Lincoln Institute of Land Policy Working Paper 1997). Note that several countries, including France and Indonesia, employ a similar approach to minimizing valuation costs. In each of these countries the valuation of any individual land parcel is determined by two factors: the land area and the market value of similarly-situated land. The difference between these systems and those currently used in Estonia and Romania is that categories of "similarly-situated" land are based on actual market values rather than on approximations.

estimating profitability of land. "Profitability" is determined by: (a) the quality of land as recorded in the Soviet era; and (b) the location of the land relative to markets and services.<sup>10</sup>

Romania, Poland and Uzbekistan have adopted revised land tax laws which base valuation on projected ("presumptive") income from a given area of land. In Romania, the taxable presumptive income is determined based on tables that estimate income per hectare for different types of land, different classes of land fertility, and, in some cases, the location of the land. The tax is equal to ten percent of the presumptive taxable income.<sup>11</sup> Similarly, the land tax law in Uzbekistan provides for valuation based on the land's potential for agricultural productivity.<sup>12</sup> Productivity estimates are based on old Soviet agronomic reports, differentiating between irrigated and non-irrigated land, levels of soil quality, and the relative need for fertilizer.<sup>13</sup> Under Poland's land tax law, valuation is based on "accounting hectares," which serve as a measure for projected productivity. Value of an "accounting hectare" is determined by type of land use, soil type (six categories), and location (proximity to markets).<sup>14</sup> The Czech Republic's 1993 tax law which introduces fertility, land quality and partial locational differentiation (by linking the rate to the population of the municipality) is an improvement over the old regime's soil quality base, according to some commentators.<sup>15</sup>

An alternative approach for ECA countries is to adopt a land tax law establishing area-based valuations in the initial implementation period with the proviso to transfer to market-based valuations once more information becomes available. Russia and the Czech and Slovak

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<sup>10</sup> Müller, *supra* note 1, at 138. It is essential that assumptions underlying "profitability" projections are sound. The Ukraine experience inspires a note of caution. Recognizing the arbitrary nature of valuations based on farmland quality, in 1995 Ukraine adopted a supposedly scientific, market-based approach to valuation formulated by the Ukrainian Academy of Sciences. This approach was based on the projected productive capacity of the land as determined by the value of present production (less costs of production) multiplied by thirty-three years and discounted by a factor of about three percent per year. Although this general approach may have been sound, the underlying assumptions were not, as evident by the exorbitant land values (average \$2,000/ha) they yielded. These values are 20 to 40 times higher than the old normative prices for land and considered extremely high by market standards in other countries. Commentators have highlighted the 3% annual discount rate as the crux of the problem, stating that it is too low to accurately take into account the risks associated with agricultural production which may be especially high in transition economies. Csaki & Lerman, *supra* note 7, at 20.

<sup>11</sup> Müller, *supra* note 1, at 134.

<sup>12</sup> Julia Eckert & George Elwert, *Land Tenure In Uzbekistan* 36 (Deutsche Gesellschaft für Technische Zusammenarbeit Sector Project Paper 1996).

<sup>13</sup> *Id.* at 36.

<sup>14</sup> Reiner & Strong, *supra* note 6, at 230.

<sup>15</sup> *Id.* at 207-08.

Republics have scheduled to convert from area-based valuations<sup>16</sup> to market-based valuations within a period of several years as market information becomes available.<sup>17</sup>

The valuation method best suited for ECA countries will depend on the existing level of market development. At least until an agricultural market is functioning, the best valuation method may be an updated version of the area-based valuation used during the Soviet era. This would help to ensure objectivity, avoid the risks of over-estimating agricultural land values in the absence of a market, and provide an affordable approach to valuation.<sup>18</sup>

Laws permitting infrequent valuation cycles can also deter land tax systems from functioning efficiently. Valuations that lag too far behind market values may result in artificial limits on tax revenues, inequities between taxpayers, and land speculation in areas of high conversion from rural to urban land use. Some ECA countries with recently reformed land tax laws have attempted to address this problem. Proposed changes to Albanian tax law, for example, would require re-evaluations every three to five years.<sup>19</sup> Although little market information existed in Estonia, a valuation of all land was conducted in 1993 and again in 1996 to capture changes in approximated market values.<sup>20</sup>

Whether the valuation method in an ECA country is based on market values or area, regulations and practices allowing or encouraging the under-reporting of sales prices, taxable area, or other valuation factors hinder the accurate compilation of information needed to establish a tax base.<sup>21</sup> Higher tax rates may also contribute to under-reporting.<sup>22</sup> In Moldova, for example,

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<sup>16</sup> See, e.g., Russian Federation State Tax Service Instruction No. 29, "Application of the Russian Federation Land Charges Act," registered with the Ministry of Justice on May 6, 1995, under No. 850 (with Amendments and Addenda No. 1 of July 17, 1995). For further discussion of the Russian land tax law, see Part II, sec. D, *infra*.

<sup>17</sup> Müller, *supra* note 1, at 134. Some commentators support this rapid transition, holding that substitutes for market-based valuations should be replaced in transitioning economies as soon as possible after a land market develops and market-based valuation is feasible. ANN LOUISE STRONG ET AL., TRANSITIONS IN LAND AND HOUSING: BULGARIA, THE CZECH REPUBLIC, AND POLAND 74 (1996).

It will be several years before Russia's agricultural land taxation system makes the complete transition from setting tax levels based upon soil quality and location to setting tax levels based on a tax rate combined with an assessment of an agricultural land plot's market value. A recent federal law, however, established a pilot project in two cities which appears to make a change in this direction. According to the law, the tax base of the land tax in the cities of Novgorod and Tver shall be calculated from estimated market costs. The law leaves the procedure for estimating market cost up to the municipal governments. Law of the Russian Federation No. 110-FZ, "On Carrying Out an Experiment on the Taxation of Immovable Property in the Cities of Novgorod and Tver" (July 20, 1997).

<sup>18</sup> Müller, *supra* note 1, at 138-39.

<sup>19</sup> Roy Kelly, *Implementing Property-tax Reform in Transitional Countries: The Experience of Albania and Poland*, 12 GOVERNMENT AND POLICY 319, 326 (1994).

<sup>20</sup> See Müller, *supra* note 1, at 127-46.

<sup>21</sup> Accurate reporting of market transfer prices is a critical step toward fair and accurate property taxes. Strong, *supra* note 17, at 227.

a dramatic increase in the land tax rate in 1995 has been cited as a contributing factor in under-reporting by farmers.<sup>23</sup>

## **B. Ineffective Distribution of Revenues**

A prerequisite for public approval of a land tax system (and so indirectly a factor contributing to support for land privatization) is a clear and effective plan for revenue distribution by the taxing entities.<sup>24</sup> Several problems have arisen in this context in the ECA.

First, laws in some countries provide that land tax revenues collected locally be directed to central or regional governments rather than local government activities which are often more visible and responsive to the taxpayers. Under current law in Russia, for example, cities are allowed to keep only 40% of land tax revenues. Of the remaining 60%, 40% goes to the *oblast*, or regional, level, and 20% goes to the central government.<sup>25</sup> In comparison, Tajikistan law weights revenue distribution toward local governments. District and town executive bodies receive 85% of the total revenues; only 15% of the revenues are distributed at the state level.<sup>26</sup>

Second, unclear spending responsibilities for local governments hinder them from effectively managing land tax revenues and thus reduce taxpayer enthusiasm. In Bulgaria, Hungary and Poland, vague rules on local governments' spending authority in areas such as primary education, local transportation and the environment have created confusion and inefficiency in distributing tax revenues. And in Bulgaria and Romania, limited spending discretion granted to local governments has deterred effective use of tax revenues.<sup>27</sup>

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<sup>22</sup> See discussion *infra* note 90.

<sup>23</sup> WORLD BANK, WITH FARMER'S EYES: A GRASSROOTS PERSPECTIVE ON LAND PRIVATIZATION IN MOLDOVA 23 (World Bank Paper, EC4NR Agriculture Policy No. 7, 1996) [hereinafter Land Privatization in Moldova].

<sup>24</sup> A lack of adequate local revenue remains an obstacle to effective decentralization. Kelly, *supra* note 19, at 319.

<sup>25</sup> Law of the Russian Federation No. 1738-1, "On Payments for Land" (October 11, 1991) (amended February 14, 1992, July 16, 1992, May 14, 1993, August 9, 1994, August 22, 1995, and December 27, 1995) [hereinafter Law on Payment for Land].

<sup>26</sup> Land Code of the Republic of Tajikistan, art. 37 (1990) (amended December 13, 1996).

<sup>27</sup> Richard M. Bird et al., *Fiscal Decentralization in Transition Economies: A Long Way to Go*, 6(3) TRANSITIONS 7, (World Bank/ PRDTE, March 1995). In Bulgaria, for example, the Minister of Health defines even the expenditures for the medicine inventories in municipal hospitals. *Id.* at 8.

### C. Over-taxation

Commentators have at times advocated high land taxes as a means to encourage efficient land use.<sup>28</sup> Henry George, a nineteenth century American economist, initiated the modern debate on this issue by promoting a single tax on the value of land only.<sup>29</sup> George advocated taxing unimproved land at 100% of its surplus value to encourage landowners to develop their land to its highest economic potential.<sup>30</sup> Since all land would be taxed at the same level regardless of use, George argued that owners would profit to the extent that the actual rent derived from the land exceeded the amount of the tax.

From the outset of George's expression of these ideas, land tax opponents have pointed out that taking away profits discourages productive initiative and retards economic growth. High land taxes may be an especially risky strategy when applied in transitioning economies.<sup>31</sup>

First, current private landowners or land users in ECA countries would suffer financially because they bear the initial cost of land devaluation. When the land tax is imposed, the landowner or land user experiences a sudden and significant loss of capital because the prospect of future tax payments drives down the current value of the land. Land would suddenly be worth much less. Private farmers could be particularly hard hit by this reduction in value, as their

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<sup>28</sup> The debate on this issue can be traced back to a 17th Century group of French economists known as the Physiocrats, who proposed a single tax on land rent as a means to distribute the products of agriculture (then considered the primary source of wealth) among different classes. Robinson, *supra* note 3, at 130.

<sup>29</sup> HENRY GEORGE, *PROGRESS AND POVERTY* 406 (4th ed. 1948).

<sup>30</sup> Assuming that marginal land breaks even, so that the income from the unimproved land equals expenses, the economic rent of Plot "A" is defined as the total yield of Plot "A" less the total yield of a marginal land plot. According to Georgist land tax proponents, taxing one hundred percent of the economic value of land will: (a) encourage the highest utilization of the land; (b) target "unearned" wealth to achieve income distribution; and (c) discourage speculation.

<sup>31</sup> See Roy Prosterman & David Bledsoe, *High Land Taxes: A Dangerous and Virtually Untested Theory* (April 15, 1994) (unpublished Rural Development Memorandum on file with the Rural Development Institute).

While the prevailing concern in ECA countries is over-taxation of land, under-taxation—at least in market economies—may also raise problems. According to some modern commentators, laws that allow an effective tax rate to be too low in a market economy may fail to accomplish the underlying goals of instituting the tax itself: fairer distribution of the benefits of private landownership and greater rationality in land use decisions. See Robinson, *supra* note 3, at 72. If the cost of holding land is low, landowners (public and private) are more likely to simply hold land in expectation of capital gains rather than to treat it as a factor of production. This can result in a significant amount of land held off the sales market (and long-term lease market) for speculative purposes. A related result is that land can be used inefficiently or not at all. This pattern has been noted in Japan. See *infra* note 106 for further discussion.

Despite the risks that accompany under-taxation, a low tax is better than no tax. As will be further discussed in Section III of this chapter, ECA countries without functioning agricultural land markets, and with various negative factors affecting the agricultural sector and perhaps the entire economy, may be well-served by implementing a low effective tax rate, at least until the market matures and other economic variables alter.

access to credit required for land improvements would be significantly more difficult because the land would be less valuable as loan security.

Second, the ability of high land taxes to stimulate the highest and best economic use of land could result in socially undesirable development. In urban areas, landowners or land users would face pressure to replace low and medium income housing with more profitable luxury apartments. In agricultural settings, similar pressure would exist to take farmland out of agricultural production in order to build factories or apartments.

Third, due to the risks inherent in agriculture, farmers might be unable to accommodate high annual land taxes. In years when crops are poor, farmers may be unable to pay the tax, giving collective owners or the government an excuse to take back the land. Over a period of time a high land tax could concentrate ownership of most farmland in the government, making the state, in effect, a kind of super-landlord. Landowners or land share holders unable to pay taxes given depressed lease and sales markets might transfer land back to the collectives. Even in good production years, taxes could be so high that small farmers and pensioners would be unable to afford them, leading to land consolidation and public disapproval for land tax and privatization.<sup>32</sup> In Moldova, for example, some farmers responded to dramatic increases in the land tax rates in 1995 by concealing information and refusing to pay. They claimed they could not afford the taxes and that they did not get any visible return from revenues.<sup>33</sup>

Fourth, high land taxes and the perception of high land taxes may deter members of large collective farms from withdrawing to start small peasant farms. During fieldwork conducted by the Rural Development Institute in both Russia and Tajikistan in the fall of 1998, new private farmers and collective farm members consistently reported high land taxes as a deterrent to private farming. The deterrent effect may be especially high when high land tax rates are accompanied by arbitrary enforcement mechanisms, stiff penalties including termination of land use rights, and when in-kind payments are not an option.<sup>34</sup>

It is often difficult to judge the significance of a particular land tax in an ECA country because of the valuation problems (discussed above) that exist in the absence of a developed land market. At least in terms of contribution to revenues, it appears that yields from such taxes in ECA countries have so far been low,<sup>35</sup> despite the perceptions of high taxes by private farmers

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<sup>32</sup> N. Hamid, *Dispossession and Differentiation of the Peasantry in the Punjab During Colonial Rule*, JOURNAL OF PEASANT STUDIES 52-72 (1983), cited in Binswanger, *supra* note 2, at 69. (A significant land tax contributed to concentration of land holdings in India.)

<sup>33</sup> Land Privatization in Moldova, *supra* note 23, at 23.

<sup>34</sup> Some ECA countries have attempted to mitigate the potential chilling effect of land taxes on private farming by creating limited exemptions for new private farmers. Russian law provides for a 5-year land tax exemption for new peasant farm enterprises. Law On Payment for Land, *supra* note 25, art. 12. Tajikistan law provides for a one-year exemption to new private farmer on arable lands and a 3-year exemption on lands being converted from non-arable to arable. Law No. 450 of the Republic of Tajikistan "On Payment for Land" art. 9 (May 15, 1997).

<sup>35</sup> Bird, *supra* note 27.



The Estonian land tax law provides for both a national land tax (0.5% of estimated market value) and a local land tax (0.3% to 0.7% of estimated market value, to be determined by municipal councils).<sup>36</sup>

Under proposed Albanian legal reforms, the effective tax rate on farmland would range between 0.4% and 2.0%.<sup>37</sup> This effective rate is derived from a centrally-established rate of 2% which is levied on some coefficient (0.2 to 1.0) of the taxable value of the land.<sup>38</sup>

Russia's land tax, levied on agricultural and peasant farm enterprises,<sup>39</sup> does not establish the rate of taxation as a percentage of land value, but instead fixes a specific amount of tax to be paid for one hectare of arable land for each of Russia's 89 provinces.<sup>40</sup> Tax levels for perennial grasses, meadows and pastures are extrapolated from the fixed rates for arable land. The fixed tax levels vary widely from *oblast* to *oblast*, and are at least nominally related to soil quality and potential productivity. In general, however, the rates are extremely low.<sup>41</sup> In an effort to keep up with Russia's high inflation over the last several years, the taxation levels have been increased roughly 90 times above the original levels set out in the law in 1991.<sup>42</sup>

Russia's law provides that the *oblasts* have some leeway to adjust actual tax levels using the criteria of land quality and location, with the federally-mandated taxation levels serving as a starting point.<sup>43</sup> *Oblast* legislatures are allowed to adjust the per-hectare levy based upon

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<sup>36</sup> Müller, *supra* note 1, at 127-46.

<sup>37</sup> Kelly, *supra* note 19, at 326.

<sup>38</sup> *Id.*

<sup>39</sup> Law on Payment for Land, *supra* note 25, art. 4.

<sup>40</sup> *Id.* art. 5; Appendix 1.

<sup>41</sup> *Id.* art. 5. The rates stipulated for Vladimir *Oblast*, for example, varied by *rayon*, ranging from 3,092 (old) rubles (roughly equal to 51 cents) per hectare of plowed field in Gus-Khrustalny *rayon* to 4,518 (old) rubles (roughly equal to 75 cents) in Suzdal *rayon*. Aleksey Pulin, Memorandum to Rural Development Institute from The Land Reform Support Center of Vladimir *Oblast* re: Tax Study 6 (Dec. 5, 1996) (on file with the Rural Development Institute).

<sup>42</sup> Levels of taxation were increased in 1994, 1995, 1996, and 1997 by the following legislation:

- Law of the Russian Federation No. 9-FZ, "On the Federal Budget for 1994," (July 1, 1994).
- Resolution of the Government of the Russian Federation No. 562, "On the Indexation of the Rates of the Land Tax in 1995," (June 7, 1995).
- Resolution of the Government of the Russian Federation No. 378, "On the Indexation of the Rates of the Land Tax in 1996," (April 3, 1996); and
- Law of the Russian Federation No. 29-FZ, "On the Federal Budget for 1997," (February 26, 1997) (amended July 14, 1997).

<sup>43</sup> See Law on Payment for Land, *supra* note 25, art. 5.

different soil qualities and land plot location.<sup>44</sup> In addition, local governments may raise the land tax rates on garden and truck farming plots by up to 100%, using location as a basis.<sup>45</sup> Even with these additional variables, the Rural Development Institute, in its fieldwork, has rarely encountered a land tax much above the ruble equivalent of one dollar per hectare.

A Russian presidential decree issued in July, 1998 called for an increase in taxes applying to agricultural land by 400%.<sup>46</sup> The degree to which this rate hike will incur the negative effects discussed above is yet unknown. In fieldwork in Samara *Oblast* in September 1998, the Rural Development Institute found that many private farmers were aware of the increase commanded by the Decree and were concerned they would not be able to pay it. The relative effect of this Decree on private farming will depend in large part on how stringently it is enforced, and on whether it is enforced equally on both large collective-style farms and peasant farm enterprises.

### E. Exemptions and Preferences

The over-use of legal exemptions and preferences in ECA land tax law may limit revenue potential, force higher overall rates (for the land that does get taxed), and distort agricultural land values and uses.<sup>47</sup> In the initial stages of land taxation in a private market, it is important for states to simplify assessment and collection and to establish as broad a tax base as possible. This means taxing all land including agricultural land, whether privately, collectively or state-owned.<sup>48</sup>

Laws establishing exemptions not only limit revenues and create perceptions of (if not actual) inequities, they may also undermine the very social values they attempt to protect. In some cases, exemptions and preferences for undeveloped land that were intended to save farmers from forced sales to industrial developers have actually increased land speculation and urban sprawl.<sup>49</sup> This may be due to the fact that decreased land taxes are reflected in capitalization of land value, resulting in higher agricultural land market values. Higher prices for tax-preferred agricultural land might, in turn, tend to encourage speculation and discourage new farmers and

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<sup>44</sup> Instruction of the State Tax Service of the Russian Federation No. 29, "On the Application of the Law of the Russian Federation On Payment for Land," sec. 13 (April 17, 1995) (amended July 17, 1995).

<sup>45</sup> *Id.* sec. 14.

<sup>46</sup> Presidential Decree of the Russian Federation No. 854, "On Indexation of Land Tax Rates" (July 18, 1998).

<sup>47</sup> See generally Müller, *supra* note 1, at 128; Exemptions in the Soviet-era land tax law included land used by cooperatives or the state, agricultural land (if income was also subject to the agricultural tax), land use by foreign countries, medical institutions, and cemeteries. Ott, *supra* note 9, at 2.

<sup>48</sup> See Müller, *supra* note 1, at 128. ("The main rule of the tax reforms—which are such an important part of the transition process—is that the tax base should be as broad as possible so that tax rates can be kept fairly low. This rule implies that the agricultural sector must be part of the tax base and bear its share of the tax burden.")

<sup>49</sup> JOAN YOUNGMAN & JANE MALME, AN INTERNATIONAL SURVEY OF TAXES ON LAND AND BUILDINGS 4 (1994).

farm expansion.<sup>50</sup> Also, promises of low land taxes for a limited period of time may encourage speculators to buy potentially developable land and hold it off the market until the specified period of farmland protection ends.<sup>51</sup>

In Czechoslovakia, legal tax preferences based on soil quality encouraged the farming of poor soils. Soil quality was the sole consideration for farm land tax rates and poorer soils were exempt from the tax. The result was to penalize holders of good quality land and encourage farming of poor soils.<sup>52</sup>

Polish tax law, despite recent reforms, contains numerous exemptions for taxes on agricultural land. Set forth in 32 different laws, these exemptions cover government properties, embassies and international organizations, airports, churches and schools, the Polish Employee Vegetable Garden Association, and land used by research and development institutions. Local governments retain the legal authority to exempt any other properties, as well.<sup>53</sup>

Russia's current land tax law is riddled with exemptions.<sup>54</sup> Perhaps most problematic is the breadth of discretion given to tax officials in awarding exemptions and preferences not only based on types of land use but also to taxpayer categories and even to individual taxpayers.<sup>55</sup>

As mentioned in note 34, *supra*, one exemption that may provide an overall benefit to the establishment of a land market is a limited-term exemption to small private farmers. Several ECA countries in addition to Russia and Tajikistan, mentioned above, have legislated for temporary land tax relief of newly privatized holdings. Estonia's new tax law granted land a five-year exemption from the national land tax but subjects it to the local land tax.<sup>56</sup> Uzbekistan's tax law granted land tax exemptions to newly privatized farms for their first two or

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<sup>50</sup> JANE H. MALME, POLICIES AND PRACTICES THAT PROMOTE ASSESSMENT EQUITY: CASE STUDIES OF ALTERNATIVE MODELS 2 (Lincoln Institute of Land Policy 1991).

<sup>51</sup> William L. Church, *Farmland Conversion: The View from 1986*, UNIVERSITY OF ILLINOIS LAW REVIEW 521, 550 n.123 (1986).

<sup>52</sup> *Id.* at 548 n.115 (tax laws basing assessments on the highest agricultural value--e.g., by tying assessed values to soil quality-- place the heaviest burden, and so the highest conversion pressure, on the best cropland); Reiner & Strong, *supra* note 6, at 207.

<sup>53</sup> Kelly, *supra* note 19, at 327.

<sup>54</sup> Article 12 of the Law on Payment for Land, *supra* note 25, lists 20 exemptions for categories based on land and on individual taxpayers.

<sup>55</sup> See, e.g. Law of the Russian Federation No. 2003-1 on "Taxes on Property of Individuals" art. 4 (December 9, 1991) (with the Additions and Amendments of December 22, 1992, December 11, 1993, August 11, 1994, January 27, 1995) (giving autonomous governments and cities the discretion to reduce taxes for certain categories of taxpayers and individual taxpayers).

<sup>56</sup> Müller, *supra* note 1, at 127-46.

three years of operation.<sup>57</sup> In contrast, Albania's proposed tax reform contemplates only limited exemptions to the tax base, which do not include newly privatized land.<sup>58</sup> The potential advantages of any exemption, including one for new private farmers, should be weighed against the advantages of simplifying bureaucracy and keeping overall rates low through a strict "no exemptions" policy.

Other problems associated with exemptions and preferences include avoidance and increased litigation.<sup>59</sup> While a progressive tax rate based on holding size may reflect socially desirable goals, at least one commentator believes this type of rate structure is more likely to cause large landowners to create artificial subdivisions for tax purposes than to sell land to small landholders or increase production.<sup>60</sup> Land tax preferences based on farm sizes (that is, lower per-hectare taxes for smaller holdings) have failed when tried in Argentina, Bangladesh, Brazil, Colombia and Jamaica.<sup>61</sup>

#### **F. Inadequate Focus on Collection**

Failure to provide for adequate collection procedures and enforcement measures could render even the best legal land tax reform untenable. ECA countries that focus reforms on precision in valuation, to the exclusion of collection and enforcement, may undermine their original intent. In Poland, for example, legislative efforts to reform the land tax system have centered on improving valuation techniques with "little attention to the other components necessary to achieve the ultimate goal of tax collections."<sup>62</sup> According to one commentator, Poland's exclusive focus on valuation technology has become a serious detriment to its land tax reform.<sup>63</sup> Albania, in contrast, pursued a "collection-led" strategy in the proposed revision of its tax laws, which focuses not only on information-collecting and valuation, but also on taxpayer education and service, collections, and enforcement.<sup>64</sup> Under-collection may be attributed to many factors, only some of which are legal in nature.<sup>65</sup>

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<sup>57</sup> Eckert & Elwert, *supra* note 12, at 36.

<sup>58</sup> Kelly, *supra* note 19, at 326 (exemptions under proposed Albanian tax law would be limited to property used by foreign governments and/or international organizations under reciprocal international covenants).

<sup>59</sup> Binswanger, *supra* note 2, at 70.

<sup>60</sup> *Id.*

<sup>61</sup> *See Id.*

<sup>62</sup> Kelly, *supra* note 19, at 329.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 328-29.

<sup>65</sup> Factors contributing to under-collection in Indonesia prior to the 1986 reforms were several. First, use of a top-down target system (whereby the central government sets regional revenue targets based on past collection data) tended to under-estimate revenue potential. Basing revenue forecasts instead on the collective market value of real

One impediment related to collectability is unique to ECA countries where land share holders have yet to realize, or benefit from, their legal right to a fraction of the collective land.<sup>66</sup> Despite the existence of individual shares, the procedures for physical division and separation remain unclear or untried in many instances, and the collective continues to farm most of the land which is the subject of land share rights. If land taxes are levied on the legal rightholder of a land share rather than on the collective as the user or lessee of the share, there is a high probability that the legal holder will be less-than-fully aware of the potential value, or even the existence of, her land rights, and unable to afford, or simply uninterested in, payment of the tax. If the taxing entity holds the owner ultimately responsible in this situation, and enforces on her penalties for late or non-payment leading up to forfeiture, the land will likely wind up back in the hands of the state. Ultimate legal responsibility for payment of the tax in such situations may have to lie with the collective user, with financial penalties or liens on non-land collective assets as the ultimate enforcement mechanism.

### G. High Transfer Taxes

High transfer taxes not only impede land transfers, but can also result in under-declared prices which destroy the best evidence of market value necessary to establish a market-base land tax and create inequities for taxpayers who do declare accurate sales prices.<sup>67</sup> What constitutes a "high" transfer tax will depend on each situation, and must be analyzed in the context of other taxes payable by landowners. To give an idea of the range of transfer tax rates, the following Central and East European countries impose stamp taxes on transfers of land and buildings: Croatia (5%); Czech Republic (5%); Hungary (2-8%); Kazakhstan (10%); Poland (5%); Romania (7-16%); Serbia (3%); Slovak Republic (1-4%); and Slovenia (2%).<sup>68</sup> For a related discussion on taxes imposed on land transfers which impede transactions, as well as comparative approaches to transfer taxes on agricultural land, see **Chapter 7, Land Transactions**.

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property within a given region increases accuracy and encourages maximum collection. Second, manual processing of all tax information caused delayed tax billing. Third, the collection system in rural areas was unprofessional, and a lack of accurate property data encouraged "on-the-spot" adjustments by collectors in the field. Finally, taxpayers lacked incentive for prompt payment due to an absence of sanctions. The 1986 tax reform instituted strict six-month payment deadlines with penalties for late payment. Roy Kelly, *Property Taxation, in FINANCING LOCAL GOVERNMENT IN INDONESIA* 126 (Nick Dervas ed., 1989).

<sup>66</sup> For further discussion of land shares, see **Chapter 5, Farm Restructuring**.

<sup>67</sup> Vincent Renard, *Property Taxation and Land Policy in France*, 11 *PROPERTY TAX JOURNAL* 145, 149 (1992). (It can be argued that France's transfer tax is artificially high.); Muller, *supra* note 1, at 60. (The best way for a transitional economy to tax land is through a combination of: (a) an annual tax based on 1-3% of the market value; (b) a low transfer tax (1-2% of the market value); and (c) a moderate capital gains tax).

<sup>68</sup> Rebecca S. Rudnick, *Taxing Foreign Investment in Real Property*, 13 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* 395, 410 (1995).

## H. High Capital Gains Taxes

High capital gains taxes may discourage the sale of agricultural land and encourage landowners to hold their land at less than its productive capacity. If the capital gains tax on land is higher than on other assets, a rational investor is less likely to sell her land to a buyer who will use it more productively. In Japan, for example, high capital gains taxes have contributed to speculation and a restricted market supply, which in turn has contributed to artificially high land prices.<sup>69</sup> For a related discussion on ways in which taxes imposed on land transfers impede transactions, as well as comparative approaches to capital gains taxes on agricultural land, see Chapter 7, *Land Transactions*.

## I. High Inheritance Taxes

Laws setting low inheritance taxes on land can encourage landowners to hold land for estate purposes rather than treat it as a factor of production.<sup>70</sup> If inheritance taxes applied to land are lower than those on other assets, people may be encouraged to put a larger percentage of their assets into real estate as an estate planning goal, thus keeping more land out of the sales market, but not necessarily out of the lease market. Such a pattern has been documented in Japan.<sup>71</sup> Eastern European countries that have adopted gift and inheritance taxes on real property include the Czech Republic, Bulgaria, Hungary, Slovenia, the Slovak Republic, the R.S.F.S.R. and Poland.<sup>72</sup>

But at the moment the greater problem in ECA countries is probably the reverse one, of setting inheritance taxes too high, since levying even a modest inheritance tax before a well-established market has yielded predictable and known values in an ECA country may result in land reverting back to the state. Until a functioning market has attached reasonable values to farmland, any "inheritance tax" on land shares will probably cause poor or disinterested heirs (e.g., pensioners' city-dwelling children in Russia) to "refuse" the inheritance. Such refusal will cause the land to revert to the state land fund and, in effect, the collective as a rent-free user. However, by adopting an inheritance tax law which exempts a uniform value of the estate (whether held in land or other assets) from the inheritance tax, much of this risk could be avoided. See discussion in Section III.F, *infra*.

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<sup>69</sup> Marie Anchordoguy, *Land Policy: A Policy Failure*, in LAND ISSUES IN JAPAN: A POLICY FAILURE? 106 (John O. Haley & Kozo Yamamura eds., 1992) [hereinafter Land Issues In Japan].

<sup>70</sup> Note that using land as an asset does not necessarily lead to inefficient use of land as a factor of production if the lease markets are relatively free because a landowner could lease her land while holding it as an asset.

<sup>71</sup> Yukio Noguchi, *Land Problems and Policies in Japan: Structural Aspects*, in Land Issues in Japan, *supra* note 69, at 21.

<sup>72</sup> Rudnick, *supra* note 68, at 191 n.40.

### III. Land Taxation and other Law-Related Tax Issues in Developed and Developing Market Economies

This section sets forth comparative approaches to addressing the legal impediments described in Section II above: (a) inaccurate and inequitable valuation; (b) ineffective distribution of revenues; (c) over- taxation; (d) exemptions and preferences; (e) inadequate emphasis on collection; and (f) excessively high inheritance taxes. For a further discussion of legal approaches to effective taxation of land transfers and capital gains, see *supra* Chapter 7, *Land Transactions*.

#### A. Inaccurate and Inequitable Valuation

##### 1. Register/ Cadastre

In the United States, legal property and property ownership descriptions, as well as ownership and sales prices, are usually recorded in the county court or registry of deeds in the county where the land is located. The primary real-estate tax assessing units in each state (counties, municipalities, school districts and special authorities) are responsible for gathering information from these and other sources which may include land use regulations from county or municipal planning departments, sales and rental data, and data on construction costs from commercial building cost services.<sup>73</sup> The assessor creates and maintains cadastral assessments or tax maps.

The French Land Tax system relies on a register of deeds organized by parcel identification number in a fiscal cadastre. Landowners must provide information concerning physical changes to the land to tax officials in order to update the cadastre. Officials use the cadastre information to categorize properties for taxation according to location, characteristics and use.<sup>74</sup>

Tax assessors in Canada have a high degree of legal authority to access information from a wide variety of sources, including the Land Title Registries which contain property descriptions and legal ownership information, sales, purchase, and other realtor data, and any information needed from the grounds of the property itself.<sup>75</sup>

In Japan, local tax officials rely on the Land Registry for accurate property information. Upon transfer of landownership, most landowners in Japan file proof of title with the Land Registry in order to protect their rights (although this is not legally required). The owner's

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<sup>73</sup> Youngman & Malme, *supra* note 49, at 211.

<sup>74</sup> *Id.* at 127.

<sup>75</sup> *See id.* at 96-97.

name, the property identification number and location, and other rights and encumbrances on the property are included in the proof of ownership. However, the sale price is not.<sup>76</sup>

In Indonesia, where a 1986 tax reform yielded a marked increase in revenues, all taxpayers are required to provide data on their real property holdings by self-declaration in a sworn statement.<sup>77</sup> The tax department undertakes field exercises to collect these sworn statements, assign or correct the property identification numbers, audit property tax information, and make parcel based maps.<sup>78</sup>

## 2. Market-based Valuation

Under United States law, fair market value determined by the highest and best economic use is the most common land tax base. Different states employ different methods to estimate the highest and best economic use, including comparable sales, income capitalization (based on current rental value) and cost of replacement.<sup>79</sup>

Valuation under the French land tax is governed by a 1989 statute, which classifies seven categories for valuation purposes. The Ministry of Finance assigns values to a representative parcel in each of the seven groups, then a local committee assigns all parcels to one of the categories.<sup>80</sup> The land tax is based on current-use values. Valuation within each of the categories is determined by comparable rental values or by deriving rental values from market values. The central tax administration augments these initial valuation rates with periodic adjustments.<sup>81</sup>

Land valuation under Indonesian tax law is conducted according to comparable sales information. To reduce valuation costs, the government has established land and building valuation categories, similar to those used in France. Categories are based on location and average land values per square meter. In this way, the government achieves relative accuracy in valuation while avoiding the cost of individually assessing each property.<sup>82</sup>

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<sup>76</sup> *Id.* at 25.

<sup>77</sup> In 1986, Indonesia enacted major land tax reforms that replaced seven disparate real property taxes with one unified national tax on land and buildings (PBB) and introduced "collection-led" reforms emphasizing collection and enforcement practices. As a result of these reforms, real property tax revenue in Indonesia has increased to five times its former level. *Id.* at 133-40.

<sup>78</sup> *Id.*

<sup>79</sup> See generally JAMES C. BONBRIGHT, *THE VALUATION OF PROPERTY* (1937). This two-volume work, while written many years ago, remains a classic text on valuation methods and issues.

<sup>80</sup> Renard, *supra* note 67, at 147-48.

<sup>81</sup> Youngman & Malme, *supra* note 49, at 128.

<sup>82</sup> *Id.* at 133-40.



Under the tax law in force in 1991, farmland in Germany was valued by its "produce capacity." This figure represented a multiple of 18 times the estimated net profit of the land achievable with decent management, no debts, and paid labor.<sup>83</sup> These produce values, or "standard tax values" for farmland were determined by relative soil quality as well as other natural and economic production conditions.<sup>84</sup>

### 3. Frequent Valuation

Most laws in jurisdictions with established land taxes require re-evaluation (or "reassessment") cycles of one to five years.<sup>85</sup> In Canada and the United States, most jurisdictions require cycles of two to five years and adjust values by general factors in the interim.<sup>86</sup> Reassessment in Denmark occurs every 4 years, but this time period may be extended.<sup>87</sup> Japanese law requires reassessment every 3 years.<sup>88</sup> French national law mandates revaluation every six years.<sup>89</sup>

### 4. Incentives for Accurate Reporting

Taxing entities within developed market economies often use the expectation of future capital gains taxes as an incentive for accurate reporting of sales price information for land tax purposes. Because the capital gains tax applies to the profit in a land sale, it provides an incentive for the current buyer not to under-report the purchase price for land-tax purposes, because this price becomes the cost basis in calculating profit upon sale.<sup>90</sup>

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<sup>83</sup> Lipinsky, *supra* note 1, at 254.

<sup>84</sup> *Id.*

<sup>85</sup> In the United States periods for reappraisal vary from state to state. In states without annual reappraisal, assessing units may be required to adjust values automatically in the years between appraisals. Malme, *supra* note 50, at 1. Periodic and frequent reappraisals may also contribute to a high degree of assessment uniformity in the United States.

<sup>86</sup> *Id.* at 32.

<sup>87</sup> See Youngman & Malme, *supra* note 49, at 120.

<sup>88</sup> KOICHI NISHIMURA et. al., REAL ESTATE TAX VOLUME II, PREFECTURAL AND LOCAL TAXES 318-20 (1992).

<sup>89</sup> Despite this legal mandate, the last valuation for the Land Tax occurred in 1961. Taxpayers and theorists have been critical that assessed values lag far behind market values, causing distortion and an inadequate tax base. See Renard, *supra* note 67, at 147-48 (repeated postponement of general reassessment prompted a 1989 statute which ordered a reassessment of the tax base).

<sup>90</sup> During the Meiji era in Japan, many farmers under-reported the area subject to what was regarded as a relatively high (2% of the rent value) land tax. At least one commentator has noted that under-reporting would not have been a problem with a lower-level tax. Nor is it a problem now, as landowners do not want to interfere with future capital gains. (Purchase prices reported for land tax purposes are also used as the cost basis for calculating profit subject to capital gains upon future sale. Thus, reporting a full and accurate purchase price for land tax purposes

## B. Revenue Distribution

The primary purpose for real property taxation in most countries is the generation of local government revenue.<sup>91</sup> Accordingly, the vast majority of land tax laws allow revenues to be "retained by" local level governments. In most countries, taxes are collected at a local level, aggregated at a regional, state or national level with revenues from other local tax districts, then redistributed to the local governments based on a combination of fiscal need and revenue-production.

Laws in the United States provide one example of how this sort of distribution system might work. Under tax law in some states, counties collect and distribute taxes to local governments (counties, cities, and special districts) while in others, each taxing unit (such as a school district) collects its own taxes, to be distributed by the county.<sup>92</sup> Taxes are distributed to local governments on the basis of revenue-producing capacity and fiscal need. Tax revenue distribution is often based on an equalized assessment, by which revenues are distributed among jurisdictions in inverse proportion to property wealth.<sup>93</sup>

Under French law, the central government automatically distributes tax revenues among subnational governments according to their taxing capacity and taxing effort.<sup>94</sup>

Property tax proceeds represent a substantial portion of local tax revenues in many countries. For example, taxes on immovable property (land and buildings), represent the majority of local tax revenues in each of the following countries: Australia (91-97%), Canada (81%), the United States (95%), the Netherlands (74.5%), and Israel (66%).<sup>95</sup> Property tax revenues are also a significant source of local tax revenue (41%) in Japan,<sup>96</sup> Germany, France, and the UK.<sup>97</sup>

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gives a higher basis and results in a lower taxable profit upon sale. In the meantime, it also gives accurate market-price information to the land tax administration.) See Noguchi, *supra* note 71, at 20.

<sup>91</sup> Virtually all local governments rely to some extent on property tax, and in several countries including Australia, Canada and the U.S., local governments depend almost exclusively on them. Kelly, *supra* note 19, at 320.

<sup>92</sup> Youngman & Malme, *supra* note 49, at 127.

<sup>93</sup> *Id.* at 209-11.

<sup>94</sup> *Id.* at 127.

<sup>95</sup> *Id.* at 42.

<sup>96</sup> *Id.*

<sup>97</sup> Lipinsky, *supra* note 1, at 253.

In Indonesia, local and provincial governments retain the lion's share of revenues from the land tax. Sixty-five percent of the revenue goes to local governments, sixteen percent to provincial governments, ten percent to the central government, and nine percent is divided between local and central governments as compensation for collection costs.<sup>98</sup> Distribution to regional governments is determined by need rather than by regional revenue production. In 1991-92, land tax revenues varied from 2-10% of total revenues and 11 – 66% of tax revenues for regional-level governments.<sup>99</sup>

Although different governments' tax laws may treat the details of distribution differently, all developed systems use clear written rules to guide distribution between various inter-governmental levels. Written tax codes and regulations spell out the proper subjects for local government spending, alleviating confusion that may cause inefficiency and unaccountability in the handling of tax revenues.

### C. Over-taxation.

The best tax rate for a given ECA country will depend on a number of factors including whether a land market is functioning, the development of cash markets for agricultural crops, macro-economic factors affecting the general profitability of farming, and whether land is yet perceived to have significant value.

Outside of the ECA, actual land tax rates are controlled in a variety of ways. One approach is to establish a variable rate which may be changed periodically. An alternative approach is to establish a flat rate, but retain control over the percentage of the assessed value of the tax base that may be taxed at the given rate. Under Indonesian law, for example, the uniformly applied annual tax rate is 0.5%. The key variable in the effective tax rate is the assessment ratio, set annually by the President between 20 and 100% of the full market value of the tax base. This yields an effective tax rate of 0.1 to 0.5% of full market value.<sup>100</sup> Another important variable in the effective tax rate is the degree of exemptions and preferences that are available, as will be discussed in the following section.

According to land tax law in the Australian State of New South Wales, land valued under \$160,000 is exempt and land valued over \$160,000 is taxed at a rate of 1.5% of the assessed market value.<sup>101</sup>

Denmark's tax law levies a county land tax at the rate of one percent of the assessed market value and a municipal land tax at the rate of 0.6 to 2.4% of the market value.<sup>102</sup>

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<sup>98</sup> Kelly, *supra* note 65, at 122.

<sup>99</sup> Youngman & Malme, *supra* note 49, at 133-40.

<sup>100</sup> Kelly, *supra* note 65, at 119.

<sup>101</sup> Youngman & Malme, *supra* note 49, at 81.

In the United States, local governments set tax rates within state guidelines and depending on annual fiscal needs. Most states set statutory minimums or maximums within which democratically elected local governments may select an exact rate. As a percentage of assessed market value, the effective tax rate on agricultural land varied from 0.09% to 3.2% between 1981 and 1991, depending on the state. The average effective rate was 0.8%.<sup>103</sup>

The Japanese Fixed Asset Tax applies to agricultural land at 1.4% of the assessed market value. Agricultural land designated as a "productive green area" within an urban zone is exempt from this tax.<sup>104</sup> The government achieves flexibility in the actual tax rate by altering the percentage of the assessed market value base to be taxed. Agricultural land designated as a "productive green area," for example, is taxed at 1.4% of one-half of the assessed market value, for an effective tax rate of 0.7%.<sup>105</sup>

Japan also levies a Special Land Holding Tax annually on land over a certain size which is held idle. This tax, levied at 0.3% of market value, exempts the first 30,000 yen per square meter which results in the exemption of most agricultural land.<sup>106</sup>

It may be advisable for those ECA countries where a functioning market does not yet exist to consider establishing laws that allow for a low, uniform tax rate similar to that provided by the Indonesian law of 1986. If accompanied by a commitment to collection and enforcement, even a low tax rate can generate significant revenues. Allowing payment in-kind in some circumstances (e.g., if the government already collects crop quotas or if it maintains a grain reserve) might provide additional flexibility for pensioners and small farmers to pay taxes. One hazard in beginning with low rates, however, is entrenchment of taxpayer interests; beginning low may raise the political stakes of increasing rates at a future time. Governments could anticipate this by writing in "sunset provisions" to the tax laws securing the government's authority to raise the tax rate at a future specified date.

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<sup>102</sup> *Id.* at 118.

<sup>103</sup> *FTA Newsletter Highlights Electronic Filing, Farm Taxes*, 92 TAX NOTES TODAY, Dec. 22, 1993. In 1992, farm landowners paid land tax at an average rate of .84% of the market value. *Economist's Testimony at Senate Agriculture Panel Hearing on Possible Tax Reforms to Aid Agribusiness*, 95 TAX NOTES TODAY, Feb. 7, 1995.

<sup>104</sup> Amendments to the tax laws in 1990 made it much easier for farmland to receive this tax-free designation. Anchordoguy, *supra* note 69, at 106.

<sup>105</sup> Youngman & Malme, *supra* note 49, at 150.

<sup>106</sup> Commentators have noted that this tax would have to be at least 0.5% to affect speculation. Anchordoguy, *supra* note 69, at 101. One commentator on Japanese tax policy persuasively argues that Japan's land is inefficiently allocated and used. He points to extremely high land prices coexisting with much land being left idle or underutilized. He cites relatively low land taxes (compared to the US and UK) as one factor leading people to treat land as an asset rather than a factor of production. Noguchi, *supra* note 71, at 18-20.

#### D. Exemptions and Preferences

Taxing entities in developed countries treat exemptions or preferences for agricultural land in several ways.<sup>107</sup> First, some laws completely exempt agricultural land from the land tax base. Examples include the laws of the United Kingdom, the Netherlands and Sweden.<sup>108</sup> Several ECA countries have enacted laws which grant temporary exemptions for newly privatized farmland. Second, some laws offer land tax preferences for agricultural land. In the United States and Canada, for example, the laws of many states and provinces value agricultural land on its current use value rather than its market value, a change that can result in a significant decrease in assessed value. Some legal frameworks indirectly bestow tax benefits on agricultural land through income or sales tax preferences for farmers. Third, other laws such as those enacted by Indonesia offer no land tax exemptions or preferences for agricultural land.

In the United States, 47 out of 50 states have enacted laws which grant some sort of tax preference for agricultural land.<sup>109</sup> Partial tax exemptions for agriculture, forests and open spaces often take the form of valuation based on current use value rather than the highest and best use market value.<sup>110</sup> Most programs are voluntary and temporary. In a typical program, an owner of farmland contracts with the state to keep her land in farming for a 10-20 year period in exchange for tax reductions. If the landowner opts out early she must pay the past reductions plus interest.<sup>111</sup>

Tax laws adopted by the federal government and some states in the U.S. provide alternatives to property tax preferences for cutting the tax burden on farmers. State income tax deductions or credits have helped preserve farmland in some instances.<sup>112</sup> One unique program called a "circuit breaker" entitles farmers to a state income tax credit determined by the ratio of

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<sup>107</sup> Justifications for tax preferences include: (a) to ease the potentially regressive impact of property taxes; (b) to reduce the impact of tax shifts caused by changing economic conditions; (c) to relieve political pressure on assessors to under-value and over-value certain property categories at a local level; (d) to increase equity; and (e) to allow for the continued use of land for socially desirable purposes. See Malme, *supra* note 50, at 27; and JANE H. MALME, *PREFERENTIAL PROPERTY TAX TREATMENT OF LAND 2* (Lincoln Institute of Land Policy 1993). As to point (5), please see the discussion on alternative approaches to promote agricultural land preservation in Chapter 6, *Land Use Regulation*.

<sup>108</sup> Youngman & Malme, *supra* note 49, at 9.

<sup>109</sup> David L. Chicoine et al., *The Effects of Farm Property Tax Relief Programs on Farm Financial Conditions*, 58 *LAND ECONOMICS* 516 (1982), cited in Terence J. Centner, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 *ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 27 (1997).

<sup>110</sup> Where the current use value exception is applicable, valuation is typically based on actual or comparable rents.

<sup>111</sup> Church, *supra* note 51, at 549 n.117.

<sup>112</sup> See, e.g., WISCONSIN STATUTE sec. 71.09 (11) (1998).

their property tax burden to their ability to pay.<sup>113</sup> The federal income tax code also contains provisions designed to benefit farmers. Such provisions allow for accelerated depreciation and immediate deductions for farm-related expenses taxpayers normally have to capitalize.<sup>114</sup> The primary gains from income tax benefits at either the state or federal level, however, often go to wealthy farm owners (or “hobby farmers”) in the form of tax shelters rather than to small farmers trying to maintain their farmland on the urban fringe.<sup>115</sup> Other indirect tax benefits for farmland include tax reductions for farm equipment and machinery. Some taxing jurisdictions have enacted laws and regulations which, for example, reduce personal property or ad valorem taxes, or eliminate sales or use taxes on these items.<sup>116</sup>

In Germany agricultural land is, in principle, subject to tax legislation. However, most of the tax laws contain exemptions or preferences for agricultural real estate. For example, agricultural and forestry land is valued according to a reduced valuation table.<sup>117</sup> German tax law also provides direct benefits to small farmers by granting tax-free treatment on ten percent of the value of the farm to farmers with less than a certain level of net assets.<sup>118</sup>

Under Japanese tax law, the full residential land tax rate applies to agricultural land unless it falls within a special protection zone in urban areas, as established by the Productive Green Land Act of 1974, or otherwise falls within an area of rapid appreciation. Agricultural land that falls in a protected zone is taxed at one-half of its assessed value.<sup>119</sup> Tax amendments in 1990 made it easier for farmland to be designated “productive green areas.” Some believe this exemption has gutted one of the original goals behind 1990 tax reforms, which was to expand tax coverage of agricultural land in order to decrease speculation that contributed to high residential land prices through withholding of agricultural land (even when underutilized) from the market.<sup>120</sup>

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<sup>113</sup> Malme, *supra* note 50, at 28.

<sup>114</sup> Church, *supra* note 51, at 548 n.113; *see also* 26 United States Code sec. 57(2) (1998). A capitalized expense would normally be written off over an extended period of time roughly corresponding to the expected useful life of the purchased asset: the amount written off annually is taken as a deductible expense in calculating that year's taxable income. But special rules may allow quicker write-off, or even the deduction of the entire cost in the year of purchase.

<sup>115</sup> Church, *supra* note 51, at 548 n.113.

<sup>116</sup> *Id.* at 548 n.110.

<sup>117</sup> 1965 Bundesgesetzblatt I 1861-95; 1970 *cited in* Beatrice Knerr, *The Impact of Transfers to Agriculture through the German Tax System*, 18 EUROPEAN REVIEW OF AGRICULTURAL ECONOMICS 193, 196-99 (1991).

<sup>118</sup> *Id.* at 199.

<sup>119</sup> Youngman & Malme, *supra* note 49, at 19.

<sup>120</sup> Anchordoguy, *supra* note 69, at 105-06.

Between 1976 and 1993 in Japan, owners of rapidly appreciating agricultural land were protected by a provision of the Tax Special Provisions Act (art. 19), which lowered the taxable value of land by a "burden adjustment measure."<sup>121</sup> For example, land which had appreciated more than 1.5 times was assessed as having increased only 1.2 times.<sup>122</sup>

Although French law subjects agricultural land to the Land Tax, owner improvements to the land, such as planting crops or adding drainage, are temporarily exempted from periodic revaluations.<sup>123</sup>

Despite the fact that exemptions or preferences for agricultural land are common elements of established land tax systems in many countries, the unique situation of transitional economies underscores the importance of limiting exemptions or preferences to a bare minimum.<sup>124</sup> First, it is important that a land tax in a transitional economy capture a broad

<sup>121</sup> Nishimura, *supra* note 88. The system for 1991 to 1993 worked as follows: five levels of "burden adjustment rates" were established according to five levels of appreciation rate.

Appreciation Rate	Burden Adjustment Rate
1.075 or less	1.025
More than 1.075 and less than 1.15	1.05
More than 1.15 and less than 1.3	1.1
More than 1.3 and less than 1.5	1.15
More than 1.5	1.2

Thus, in 1991 the fixed asset tax was based on the assessed value in 1990, multiplied by the appropriate burden adjustment rate. *Id.*

<sup>122</sup> *Id.* at 96.

<sup>123</sup> See Renard, *supra* note 67, at 148; Youngman & Malme, *supra* note 49, at 126.

<sup>124</sup> Land tax exemptions or preferences for agricultural land in developed countries have been criticized in many instances. In the United Kingdom, total exemption of farmland from land taxes has achieved primarily negative results. According to one commentator, the exemption has decreased revenues to local authorities, causing increased local reliance on credit and resources transferred from the central government. Increased fiscal dependence by local authorities on the central government has in turn reduced local autonomy and raised central government control over local decision-making. The exemption has also heightened volatility in the land market by raising the price of agricultural land, which in some instances has caused increased speculation. Finally, by artificially encouraging sustained agricultural land use on the urban fringe, the exemption has contributed to a depressed rental supply of residential property and an exaggerated demand for houses and farms. Harrison in LANDOWNERSHIP AND TAXATION IN AMERICAN AGRICULTURE 183-84 (Gene Wunderlich ed., 1995).

Nor have tax preferences for agricultural land in the United States and Canada achieved a high level of success in reaching one of their major goals: agricultural land preservation. Although benefits gained through use-value assessments may have reduced the tax burden on agricultural land, they have not been strong enough to alter land-use choices in areas of transition. The difference in return between rural and urban uses on the development fringe usually outweighs any loss through tax preferences. Julian K. Greenwood & Jennifer A. Whybrow, *Property Tax Treatment of Agricultural and Forest Land in Canada: Implications for Land Use Policy*, 11 PROPERTY TAX JOURNAL 159, 161 (1992). Some commentators believe current use preferences have actually increased conversion of agricultural land by allowing speculators to pay low taxes while holding potentially convertible land. Church,

revenue base. The more inclusive the tax base (the fewer exemptions), the lower the government is able to set the overall tax rate. A larger tax base also helps ensure more adequate social welfare spending capacity by local governments.<sup>125</sup> Second, the diversity of landownership forms, including land owned by the state, collective or individual, renders inclusive taxing all the more important. This is especially true if we assume that one of the benefits of establishing an efficient land tax system in a transitional economy is to encourage local governments to support privatization. Third, avoiding inequity and the appearance of inequity, which often accompany exemptions and preferences, is essential to garnering popular support for a new tax system. Finally, to the extent that the granting of exemptions or preferences is based on the exercise of administrative discretion, significant possibilities for corruption may arise.

In most countries, the land tax base (including exemptions) is defined in laws enacted by the central government or, in federal systems, by state or provincial governments. Local officials do not have authority to make categorical or individual changes to the land tax base. In the United States, for example, local governments may have authority to change the tax rate but they seldom have authority to change the tax base. This means that local governments, including local officials, have no authority to either grant or remove exemptions.

#### **E. Inadequate Focus on Collection**

Tax laws and regulations should facilitate tax collection and enforcement. As described in note 77, *supra*, Indonesia's tax revenues increased five-fold as a result of a 1986 tax reform based on a "collection-led" approach. Reformed tax law emphasized collection and enforcement rather than accuracy in valuations. Under the 1986 law, taxes are collected annually from either the owner or the beneficiary of the property.<sup>126</sup> To facilitate tax collection a "Payment Point System" was established in 1989, designating local banks and post offices as collection points. To identify delinquent taxpayers, the Central Government issues a list of pre-printed individualized receipts to the payment points, and each payment point compiles a list of delinquent taxpayers based on undistributed receipts.<sup>127</sup>

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*supra* note 51, at n. 23. For farmers and speculators alike, development pressure may be greater than ever at the end of the temporary contract period. *Id.*

Japan has also experienced difficulties with exemptions. Prior to 1990, tax law generally covered farmland in urban areas at the same rate as residential land. Due to numerous tax loopholes for particular farmland situations, however, over 86% of the farmland went untaxed. Naoto Kan, *Proposals for Liberating More Land for Housing, in OPINIONS ON LAND AND LAND PRICE PROBLEMS*, 30, cited in Anchordoguy, *supra* note 69, at 103. Furthermore, many people claiming exempt status under these loopholes turned out to be "fake farmers." One study found that up to 60% of the people receiving special tax treatment for holding farmland were not farming it at all, but were holding urban land for speculative purposes. *Id.* at 103-04.

<sup>125</sup> See generally Müller, *supra* note 1.

<sup>126</sup> Due to unclear ownership records, the government can assign responsibility to either the property owner or beneficiary. In section F above, we note another situation, prevalent in many ECA countries, where assignment of responsibility to the actual user (the collective) rather than to the former owner (the land-share owner) seems most appropriate.

<sup>127</sup> Youngman & Malme, *supra* note 49, at 135-36.



The collection rate from the French Land Tax is close to 90%. The law gives collection authority and allows it to convert unpaid taxes into a lien on the owner's land.<sup>128</sup>

The land tax collection rate in Canada is 95%. Responsibility to pay land taxes lies with owners. Taxes are collected annually. Delinquency results in public taking of the property and sale at auction. Landowners are allowed three years before foreclosure.<sup>129</sup>

Collection and enforcement in the United States is governed by state law and local ordinances and is carried out by elected officials. The main features of the local rules, however, are quite uniform. Land tax collection occurs annually. Delinquency for a period of three years results in foreclosure and sale of the property at a public auction. The average land tax collection rate in the U.S. is close to 100%.<sup>130</sup>

Where there are both passive rightholders and actual users (such as owners of reallocated land shares and collective enterprises that still physically cultivate the land represented by those shares), it would seem highly desirable to provide in the tax law that the actual user bears responsibility for the land tax and that the passive rightholders cannot lose her rights due to nonpayment. Estonia took this approach in its Law on Taxation, passed in December of 1993.<sup>131</sup>

#### **F. Inheritance Taxes**

The value of land is subject to inheritance and gift taxes in many countries including Denmark, France, Japan, the Netherlands, Sweden, the United Kingdom, and in about one half of the states within the U.S. as well as the federal government.<sup>132</sup> Many taxing entities have carved out a sizable uniform exemption to the inheritance tax that often precludes farmland from being subject to the tax.

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<sup>128</sup> *Id.* at 128.

<sup>129</sup> Note that in both Canada and the United States, foreclosure does not occur until a delinquency of three or more years accrues. Although foreclosure is a real possibility after three years, it is used only as a last resort rather than as a means of appropriating private property.

<sup>130</sup> *Id.* at 214.

<sup>131</sup> But Estonia's law may not go far enough. The 1993 law stipulated that until 1995, land tax would be levied on the land-user, not the legal owner, pending the establishment of private ownership of the land. In cases where the legal owner was in possession of the land, she would pay the land tax. *Ott, supra* note 9, at 4. At least where the land-share system exists, even the formal establishment of private ownership in the non-using holder of the land share (who is probably a member or pensioner on the using enterprise) may not adequately alert the new owner to the reality, potential value, or transferability of her land rights. Holding her responsible for the land tax and applying foreclosure is, in such cases, simply a recipe for the renationalization of agricultural land.

<sup>132</sup> Youngman & Malme, *supra* note 49, at 41, 204.

In Germany, land is subject to general inheritance tax rules, which include exemptions for property valued up to a certain amount. Because the exemption level is high, no inheritance tax generally applies when a farm is being transferred by will.<sup>133</sup>

In Japan, an *inter vivos* transfer (transfer during the donor's lifetime) is exempt from the gift tax if the donor transfers the land to a person who has farmed for three years or more and begins farming the transferred land soon after receiving it. Inheritance tax on owner-operated agricultural land may be based on a price far below market value known as the "agricultural investment price," in an attempt to encourage recipients to continue farming.<sup>134</sup>

Farm land in the United States is subject, in principle, to both state and federal inheritance and estate taxes although it is, in fact, often privileged or exempted. Some states have reduced inheritance tax rates for agricultural land. Changes to the federal tax code in 1987<sup>135</sup> and again in 1997 raised the level for general exemptions from the estate tax (known as the "unified lifetime credit"), and provided an installment payment plan that allowed farmers to pay estate taxes over a 14 year period rather than within nine months of death.<sup>136</sup> The 1997 amendments provided a new exclusion (\$675,000) for family-owned business interests.<sup>137</sup> Both of these changes decreased the estate tax burden on farms and other property. Such a uniform exemption approach may be appropriate for many ECA settings, where an inheritance tax levied on land shares or small-to-medium-sized peasant farms or other small landholdings under current circumstances might simply lead to nonpayment and the renationalization of land. Also, under limited circumstances, the federal estate tax awards preferential treatment by applying farm use value rather than market value to agricultural land.<sup>138</sup>

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<sup>133</sup> Dr. Christian Grimm, Rural Land Law in Germany (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>134</sup> Nishimura, *supra* note 88, at 656-57, 689-90. The "agricultural investment price" is the price the land would yield if sold on the free market as permanently cultivated agricultural land. By taxing only on the portion of the land price which exceeds the "agricultural investment price," the law grants the devisee who agrees to continue farming an exemption on the portion of the market land value that is attributable to speculation on future residential or commercial development. As long as the devisee continues farming, the inheritance tax on this speculative portion is suspended. If the devisee voluntarily transfers more than 20% of the land, or quits farming, or fails to report every three years, he is charged the suspended inheritance tax and 6.6% annual interest. *Id.* One commentator persuasively argues that Japan's low inheritance tax on land (relative to other assets) has encouraged people to put a larger percentage of their assets into real estate as an estate planning goal, thus keeping more land out of the sales market. Noguchi, *supra* note 71, at 21.

<sup>135</sup> Centner, *supra* note 109.

<sup>136</sup> Ron Durst & James Monke, *The Changing Tax Burdens of Farmers* in NATIONAL AGRICULTURAL STATISTICS SERVICE 5, 7-8 (March 6, 1998). (Under 1997 amendments to the Internal Revenue Code the unified credit is scheduled to increase from \$600,000 to \$1 million by the year 2006.)

<sup>137</sup> This exclusion is granted in addition to the unified lifetime credit, except that the combination may not add up to more than \$1.3 million. *Id.*

<sup>138</sup> INTERNAL REVENUE CODE sec. 2032A (1998).

French inheritance tax law grants a conditional preference to agricultural land. If the transferee agrees to hold the land in agriculture for at least five years, land valued under 50,000 francs (about \$9,000) is taxed on one-fourth of its market value and land valued over 50,000 francs is taxed at one-half its market value. This is a significant reduction when compared with the general inheritance tax which, when the property is transferred to direct descendants or ascendants, varies from 5 to 20% depending on the full land value.<sup>139</sup>

#### **G. Other Land-Related Taxes**

For a discussion of transaction fees and profit taxes on sales of land in non-ECA settings, see **Chapter 7, *Land Transactions***.

### **IV. Checklist of Potential Legal Impediments and Solutions**

This section offers a checklist of potential legal impediments to effective land taxation, paired with potential solutions derived from the comparative approaches detailed in Section III of this chapter. The potential solutions identified below are not intended to be uniform prescriptions for every setting but are offered instead as approaches which should be considered.

#### **Potential Impediment: Legal rules governing land taxation are not sufficient.**

##### **Potential Solution**

Develop specific legislation containing appropriate, detailed rules and procedures governing land taxation (for a checklist of items to be included in such legislation, see section V of **Chapter 10, *Land Taxation***).

#### **Potential Impediment: A lack of recorded and available market information hinders accurate land valuation.**

The lack of available market information in ECA countries poses a challenge to accurate land tax valuation. Inaccurate and infrequent valuations result in a restricted revenue base and inequities among taxpayers.

##### **Potential Solutions**

- Enact legislation that establishes a land registry or cadastre to record property information and makes all information available to tax valuation officials.
- Implement regulations which provide for the use of data from public land rights auctions to develop benchmarks for market values.

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<sup>139</sup> Isabelle Couturier, *Rural Land Law in France* (May 1998) (unpublished manuscript on file with the Rural Development Institute).

- Enact legislation requiring taxpayers to provide property data by self-declaration in a sworn statement.

**Potential Impediment: Accurate valuation is deterred by insufficient resources.**

ECA economies often lack the resources necessary to conduct accurate, individual valuations.

**Potential Solutions**

- Implementing regulations could establish land valuation categories based on location and average land values (or average presumptive land values) per area. This approach helps to balance efficiency and accuracy in a new tax system.
- Legislation could provide for the use of updated versions of the Soviet-era area-based valuations.

**Potential Impediment: Under-reporting of land prices prevents accurate valuation and fair taxation.**

Under-reporting of land prices distorts information on market prices and creates inequities among taxpayers.

**Potential Solution**

- Tax legislation should require that sale price information (reported in registering land transactions) be used for both land tax purposes and for establishing the cost basis for capital gains calculations. Taxing entities should publicize to buyers that an understated purchase price will cost them higher taxes on resale.

**Potential Impediment: Land tax valuations based on only one or two factors (such as area or soil) are inaccurate and often out-dated.**

Soviet-era valuation methods based on soil quality or area alone were often outdated and inaccurate. At the same time, the risk of gross inaccuracy in estimating market values for agricultural land in the absence of a fully functioning market suggests caution in adopting any immediate changes to a purely “market-based” approach.

**Potential Solutions**

- Land tax legislation could base valuations on actual market values, if markets are functioning.

- Land tax legislation could base valuations on approximations of market value determined by a combination of factors such as area, productivity, and proximity to points-of-sale.
- Land tax laws could base valuation on the “presumptive income” of the land area, determined by land quality and, in some instances, location.
- Land tax legislation could initially establish updated area-based valuations and provide for transfer to market-based valuations when information becomes available.
- Laws and regulations could establish periodic and frequent (one to four- year) re-valuation cycles.

**Potential Impediment: Ineffective distribution of revenues between governmental levels impedes efficient expenditures of tax revenues.**

Funneling land tax revenues upward toward the central government rather than downward to the local governments thwarts the primary purpose of land taxation in most countries (funding local government expenditures).

#### **Potential Solution**

- Tax law which retains or distributes land tax revenues to local governments on the bases of need and revenue production capacity. While the criterion of need can play some role in the allocation process, the link to local revenue production capacity should be tight enough to ensure both local motivation to collect and locally visible results.

**Potential Impediment: Unclear spending responsibilities and lack of local government spending discretion impede efficient expenditures of tax revenues.**

Vague rules on local governments’ spending authority in areas such as education, local transportation and the environment create confusion and inefficiency in distributing tax revenues. A lack of local spending discretion forestalls local governments from effectively allocating tax revenues.

#### **Potential Solution**

- Adopt clear written rules to guide use of the locally retained or allocated land-tax revenue. Include proper subjects for local government spending in the tax code and regulations. Clarify legislation and policy defining local government spending responsibilities.

**Potential Impediment: Over-taxation distorts the agricultural land market and may incur negative social or economic repercussions.**

Setting tax rates which are high, given local circumstances, may impede collection potential and render pensioners and small farmers unable to pay. When combined with severe penalties, or simply because passive rightholders like pensioners may shortsightedly give up potentially valuable land rights rather than pay the tax, high taxes may be used as an excuse to re-appropriate private land.

**Potential Solutions**

- Enact legislation establishing low to moderate land tax rates. The importance of getting a land tax off the ground by beginning with modest rates outweighs any danger of speculation caused by low tax rates, at least in the initial stages of land market development.
- Anticipate and avert political barriers to future rate increases by establishing sunset provisions in the tax law which clearly set forth the authority of the taxing entity to increase the rates.
- Legislation could permit payment in kind as well as cash if circumstances warrant (e.g., if a crop quota is already in place or if the government maintains a grain reserve).
- Balance rate flexibility and stability by adopting legislation that allows for rate variation within specified parameters. Legal authority to set parameters could rest with regional or national government, while local governments could retain the authority to vary the rates within these parameters.
- Adopt legislation setting forth tax preferences to control the impact of high taxes on farm land. These can be granted via property taxes (e.g., through current use valuations in the United States and Canada, uniform reductions in the valuation base in Germany, or complete exemption in the United Kingdom), income taxes, or reduced taxes on farm equipment and personal property used for farming. See cautionary note on preferences, below.

**Potential Impediment: Numerous and complex exemptions or preferences for agricultural land may complicate and undermine the land tax.**

The over-use of exemptions and preferences limits tax revenue potential, forces higher overall rates, and may distort agricultural land values and uses.

### **Potential Solutions**

- Limit exemptions in the land tax law; alleviate completely where possible.
- Legislation should abolish discretion of local tax officials to alter the tax by prohibiting categorical or individual changes in exemptions.

**Potential Impediment: Inadequate legal and regulatory measures for collection and enforcement prevent a land tax from functioning efficiently.**

Legal reforms that lack adequate focus on collection and enforcement may undermine tax reform efforts. On the other hand, enforcing payment on passive rightholders risks reversion of newly privatized land shares back to the state.

### **Potential Solutions**

- Consider reforms to the land tax laws and regulations that prioritize a “collection-led” approach, rather than a “valuation-led” approach.
- Adopt clear written procedures for collection and enforcement to ensure adequate revenues and enacting legislation to establish the requisite administrative organization.
- Where there are both passive rightholders and actual users (such as owners of reallocated land shares and collective enterprises that still physically cultivate the land represented by those shares), provide in the tax law that the actual user bears responsibility for the land tax and that the passive rightholders cannot lose her rights due to nonpayment.

**Potential Impediment: Extremely low or extremely high inheritance taxes may result in speculation on one hand or a return to state-ownership on the other.**

Low or non-existent inheritance taxes on land may encourage people to put large amounts of assets into real estate as an estate planning goal, thus keeping more land out of the sales market. On the other hand, any inheritance tax applying to medium to small-scale farmland *plots in the absence of a land market* could result in reversion of the land back to the state.

### **Potential Solutions**

- Through tax legislation, institute a moderate inheritance tax on land, but only do so after land markets are functioning and land rights (here specifically with respect to agricultural land) are clearly perceived to have a value.

- Establish in the laws a uniform exemption for a certain value of the total estate. This would balance the concerns arising from favorable inheritance tax treatment of agricultural land (*i.e.*, use of land as an estate planning tool, resulting in speculation) with the concerns arising from application of an inheritance tax on farmland in the absence of a functioning land market (*i.e.*, refusal of inheritance leading to reversion to the state).
- Create a system of preferences in the inheritance tax law based on land-area, land-use, and category of heir. Exempt any amount of land within area limits of what used to be “free distribution” if heir is either a family member or another member of a collective farm. If heir is neither but land is within “free distribution” size limits, subject the property to a very low rate and allow payment in-kind.

## **V. Checklist of Issues for Land Taxation Law**

Implementing an effective land taxation law requires consideration of several general principles which may not be immediately evident in the preceding discussions on and checklist of impediments and solutions. This section highlights some of these broader structural and institutional concerns. The following list is not comprehensive; it is rather meant as a tool for raising some of the important issues an ECA country will encounter in establishing a land taxation law.

1. Determination of the administrative level or levels at which valuation, collection, distribution and enforcement will take place.
2. Deciding who will administer functions relating to the tax at each administrative level and how much discretion the administrator will have.
3. Setting the general tax base. Will taxes be based on market value, area value or a combination?
4. Deciding what, if any, preferences or exemptions will be awarded.
5. Definition of valuation methods. Will land be individually valued or will the taxing entity establish valuation categories of similarly-situated land? If the tax base is market value will this be determined by comparable sales data, capitalized current rents or replacement costs?
6. Determination of the frequency of re-valuation.
7. Determination of mechanisms for setting tax rates and intergovernmental agency responsible for setting tax rates.



8. Strategy for setting exemptions and rates at levels not likely to lead to significant reversion of land to the state.
9. Deciding whether and how to use sunset provisions allowing future valuation, rate or exemption revisions.
10. Determination of who is responsible for payment: in some cases it may be the user rather than the rightholders.
11. Defining collection mechanisms and administration.
12. Determination of distribution (allocation) mechanisms and administration.
13. Establishment of enforcement mechanisms and administration, including penalty provisions for nonpayment and grace periods.
14. Deciding method for taxpayer notice of assessment values and payment deadlines.
15. Allowing for taxpayer participation through appeals and monitoring, including governmental level responsible.
16. Deciding where information that is necessary for valuation, collection, enforcement and distribution will come from and who will have access to it.
17. Defining the subject areas to which local government will apply land tax proceeds, or its share of land tax proceeds.

## *Chapter 11*

# ***Compulsory Acquisition***

*by Brian Schwarzwald*

### **I. Introduction**

The doctrine of compulsory acquisition reflects the rationale that the public's interest in land may be paramount to the interests of private landowners. Every nation has retained the power of eminent domain – the right to acquire a specific piece of land from its owner or owners. As a check against this extraordinary power, however, most nations have also developed a set of guidelines governing the purposes for which land can be acquired, the level of compensation that must be paid to the owner or owners of the land (or to other substantial right holders), and the procedures that must be followed to acquire the land. These guidelines vary according to each country's balancing of private and public interests in land, but their presence is essential to the functioning of land markets. Compulsory acquisition rules or practices that do not adequately protect private land rights decrease tenure security, depress land values, reduce the acceptability of land as collateral, and thus are an obstacle to land market development.

### **II. Legal Frameworks for Compulsory Acquisition in ECA Countries**

Because of the relatively low proportion of land that has been allocated in separately held private ownership in ECA countries, compulsory acquisition practices have yet to emerge as a primary impediment to the development of land markets. When land is required for State purposes, it can often be found in the inventory of land that remains publicly owned, precluding the need to acquire land from individual owners or users. Or in the case of agricultural land, reorganized collectives may be able to respond to State requirements without the need to take separately delineated land in private hands. As the proportion of separately delineated and separately used agricultural land in private ownership increases, however, differences between public and private interests will inevitably become more apparent. The challenge for ECA countries will be to develop compulsory acquisition rules and procedures that allow the State to acquire land for certain defined important purposes, but to do so in a manner that does not impact the tenure security of private land right holders.

Some preliminary attempts to create compulsory acquisition rules and procedures in ECA countries suffer both from traditional emphasis on the power of the State over the power of individuals and from legislative inadequacy. The typical legal impediments fall into four broad

categories: (a) lack of detail on the allowable purposes for taking; (b) low or no compensation for the land; (c) inadequate procedural rules that do not involve the holder of private land rights in the acquisition process; and (d) unpredictability in rules or practice.

In other cases, adequate legal frameworks have been developed, but the lack of a need to expropriate land has yet to test the practical applicability of the laws. This section analyzes the legal frameworks governing compulsory acquisition in several representative ECA countries.

#### **A. Russia**

In Russia, Articles 279-283 of the Civil Code<sup>1</sup>, and the 1993 Regulations for the Procedure for Compensating Losses to Land Proprietors, Land Users, and Tenants, and Agricultural Losses (as amended to 1996) (hereinafter 1993 Compensation Regulations) provide an outline of the rules and procedures governing compulsory acquisition. Article 279(1) of the Civil Code enables the Federal government and its subjects to obtain land from the owner for State or municipal needs by means of mandatory withdrawal.

Article 279(2) specifies that decisions concerning withdrawal of land plots should be made by executive agencies of the federal and local governments. It further states that both the specific agencies with such decision-making powers and the specific procedures required for preparation and adoption of such decisions shall be determined by federal land legislation, which does not yet exist.

Article 279(3) of the Civil Code contains notice requirements. Under this provision, the owner of a land plot must be informed in writing not less than one year before the forthcoming withdrawal of the land plot by the agency that adopted the decision concerning the withdrawal. It also requires that the purchase of a land plot designated for withdrawal before the expiry of one year from the date of receipt of notice by the owner shall be permitted only with the consent of the owner. Purchase of less than the entire land plot is also prohibited without the owner's consent.<sup>2</sup>

Compensation is governed by Article 281 of the Civil Code and the 1993 Compensation Regulations. The Civil Code mandates that the purchase price for the land plot should be determined through agreement between the land owner and the agency withdrawing the land, and that such agreement should be based on "the market value of the land plot and of immovable property situated thereon . . . and also all losses caused to the owner by the withdrawal of the land plot, including losses which he bears in connection with the termination before time of his

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<sup>1</sup> CIVIL CODE OF THE RUSSIAN FEDERATION ch. 17, arts. 279-83. Article 13 of the Law of the Russian Federation "On Introduction Into Operation of Part I of the Civil Code of the Russian Federation" (December 1994) provides that Chapter 17 of the Civil Code shall be introduced into operation on the date of the introduction into operation of the "Land Code of the Russian Federation." A land code has not yet been adopted, therefore Chapter 17 of the Civil Code is not yet in effect.

<sup>2</sup> *Id.* ch. 17, art. 279(5).

obligations to third parties, including lost advantage.”<sup>3</sup> The addition of “lost advantage” (lost profits) to “market value” may actually lead to double recovery for the owner, since the capitalized value of expected future profits usually figures significantly in the market value of real estate. Article 281(3) further provides that, upon agreement with the land plot owner, another land plot may be granted to him in place of the plot to be withdrawn, setting off the value thereof against the purchase price. The provisions of the 1993 Compensation Regulations are consistent with those of the Civil Code, but provide somewhat more detail regarding the specific amounts and timing of compensation.<sup>4</sup> Until Chapter 17 of the Civil Code, which includes provisions governing compulsory acquisition, has been adopted, the 1993 Compensation Regulations should be treated as governing compensation for compulsory acquisition of land in Russia.

If the land plot owner disagrees with the decision to withdraw his land plot, or the land plot owner and the withdrawing agency cannot reach an agreement concerning the purchase price, the State agency withdrawing the land may bring suit in court to purchase the land plot.<sup>5</sup> The suit must be commenced within two years of the date upon which notice of the withdrawal was provided to the landowner.

A review of the provisions outlined above indicates that Russian law governing compulsory acquisition fails to provide adequate protection for landowners for several reasons. First, the scope of “State or municipal needs” for which withdrawal is allowed is not defined in the Civil Code, the Land Code, or subsequent legislation, potentially allowing the State to withdraw land for an excessively broad range of purposes. Second, although envisioned by the Civil Code, neither the agencies empowered to withdraw land nor the specific procedures required for preparation and adoption of decisions to withdraw land have been identified in subsequent federal land legislation, leaving a legal vacuum in which myriad state agencies may be able to compulsorily acquire land absent any procedural checks. Third, although Article 282 of the Civil Code protects the state’s right to compel withdrawal through the court system, it fails to specify whether and under what circumstances (for example, lack of an adequate public need) the land owner may bring suit to prevent the withdrawal of his land plot.

## **B. Kyrgyz Republic**

The compulsory acquisition rules and procedures that would be established in Article 59 of the November 16, 1997 Draft Land Code of the Kyrgyz Republic are even less adequate than

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<sup>3</sup> *Id.* art. 281(2).

<sup>4</sup> See generally Regulations of the Government of the Russian Federation “For the Procedure for Compensating Losses to Land Proprietors, Land Users, and Tenants, and Agricultural Losses,” (1993)(*amended* 1996) [hereinafter Compensation Regulations of the Russian Federation].

<sup>5</sup> CIVIL CODE OF THE RUSSIAN FEDERATION ch. 17, art. 282.

those provided by the Russian Civil Code.<sup>6</sup> Under the Draft Kyrgyz Land Code, the purposes for which land may be withdrawn in the Kyrgyz Republic remain completely undefined. Article 59 is silent on the issue of which agencies have the power to withdraw land, the procedures required for preparation and adoption of decisions to withdraw land, and the private land user's rights to petition a court to prevent withdrawal of their land. Compensation is based on the market value of the land and buildings or structures located on the land, and includes all losses inflicted on the land user due to the loss of his land use right including losses the user bears due to early termination of his obligations to third parties. Upon agreement with the land user, the State may provide another land parcel in lieu of cash compensation.

### **C. Uzbekistan**

In Uzbekistan, only a skeletal legislative framework for compulsory acquisition exists. Article 14 of the Uzbekistan Law "On Land" enables self-governmental bodies and authorities to withdraw land from private owners or users of land based on agreement between the expropriating body and the land right holder.<sup>7</sup> If agreement is not reached, an expropriation decision may be issued, but the procedures for issuance of such a decision are not made explicit by the law. The law further states that the decision may be appealed in court, but the terms and procedures for such an appeal also remain undefined. The law does not contain any provisions establishing procedures for preparation and adoption of decisions to withdraw land, notice to land owners or land users, or compensation. The law does, however, mandate that withdrawal of agricultural land for non-agricultural needs shall be allowed only in special cases and requires approval by the Cabinet of Ministers of the Republic of Uzbekistan.

### **D. Tajikistan**

Safeguards against the taking of private land rights for public and private purposes are also insufficient in Tajikistan. Article 72 of the Land Code states that when a "competent executive body" decides to sell the property of a dekhkan farm or transfer a land plot to another citizen, enterprise or organization, the landholder is entitled to full compensation for crop costs and the costs of land improvements. Articles 44-48 of the Land Code set forth rules for indemnification of agricultural losses, but is unclear when these rules apply, and whether these provisions contemplate any compensation in the event of a state expropriation of land.

The provisions described above severely impact tenure security by: (a) allowing the state to withdraw land rights of one rightholder simply to reallocate those rights to another private holder; (b) failing to clearly define what agencies have the authority to exercise the state's power of eminent domain, and in what circumstances they may exercise this authority; and (c) failing to

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<sup>6</sup> Draft Land Code of the Kyrgyz Republic (November 16, 1997). As this was written, the Land Code was pending before Kyrgyzstan's unicameral legislature but had not yet been adopted.

<sup>7</sup> Law of the Republic of Uzbekistan "On Land" (June 20, 1990) (*as amended* August 31, 1995).

define specific procedures for valuing and compensating the private rightholder for the loss of land in addition to the loss of agricultural production.

### **E. Poland**

Poland, on the other hand, provides an example of a substantially more detailed legal framework for compulsory acquisition that potentially provides greater tenure security to land right holders. Article 21 of the Constitution of the Republic of Poland of 1997 states that “[E]xpropriation may be allowed solely for public purposes and for just compensation.”<sup>8</sup> This provision is supplemented by Chapter 6 of the 1991 Law “On Land Use Management and Expropriation of Real Estate (Expropriation Law).” Chapter 6 of the Expropriation Law contains 29 articles and 75 sections establishing the permissible purposes, the level of compensation to be paid, and required procedures for expropriation of both urban and rural land. Following is an overview of key provisions of the Law related to compulsory acquisition of agricultural land.

Article 46.1 of the Expropriation Law states that expropriation should only be used “. . . in cases in which public welfare cannot be promoted without curtailing or revoking the right to the ownership of real estate . . . and the real estate cannot be contractually acquired.”<sup>9</sup> Article 46.2 of the Law limits the purposes for which land may be expropriated to:

1. The construction and maintenance of roads and public transport facilities, structures and installations needed to operate communications systems, environmental protection, premises for public offices, communal water intakes, liquid waste treatment, and flood banks;
2. The construction and maintenance of elementary schools, hospitals, nursing homes, sanitary facilities and cemeteries;
3. The construction and maintenance of structures and facilities indispensable to national defense and to assuring public safety, including construction and maintenance of prisons and institutions for juvenile delinquents;
4. The construction of organized multifamily housing; and
5. Other obvious public goals.<sup>10</sup>

The inclusion of Article 46.2(5), “other obvious public goals” provides the legislative flexibility to expand the list of permissible purposes at a later time.

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<sup>8</sup> CONSTITUTION OF POLAND art. 21.

<sup>9</sup> Poland Law “On Land Use Management and Expropriation of Real Estate”, art. 46.1 [hereinafter Poland Expropriation Law].

<sup>10</sup> *Id.* art. 46.2 (1-5).

Article 47 of the Law contains "rational remainder" provisions. These provisions allow the state to expropriate an entire real estate parcel or a part of a parcel, but require that where a part of a parcel is expropriated and the remainder of the parcel is not suitable for rational utilization in accord with its traditional purpose, the owner may demand that the entire parcel be expropriated.<sup>11</sup>

The law also requires that when a state agency wishes to acquire a parcel of real estate for public purposes, it must first notify all affected land right holders of its desire to obtain the land.<sup>12</sup> After notice has been provided, the expropriating agency must negotiate with the land right holders for a period of no less than three months to attempt to acquire the property through contractual agreement.<sup>13</sup> Once the time limit for negotiations has expired, the expropriating agency may provide a recommendation for expropriation. This recommendation must be appended with a record of the negotiations with the affected land rights holders.<sup>14</sup>

Under Article 51, the expropriation recommendation should specify:

1. Real estate with reference to the pertinent entry in the land register or records, if the latter are available;
2. The purpose of the expropriation, with a rationale of the acquisition of the real estate for that purpose;
3. The surface area of the real estate concerned, or, if the expropriation is to apply only to a part of the real estate, the surface area of both that part and the whole;
4. The manner in which the real estate has been utilized so far, and a description of its component parts;
5. Premises which should be provided to persons currently availing themselves of the buildings and premises earmarked for expropriation, and the manner in which these replacement premises shall be provided;
6. The identity of the owner, or of the possessor of the real estate if other than the owner;

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<sup>11</sup> *Id.* art. 47.2-3.

<sup>12</sup> *Id.* art. 49.3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* art. 49.2.

7. A record of the negotiations held with the owner for the purpose of acquiring the real estate, as well as other circumstances rendering it impossible to conclude a purchase contract, inclusive of the possibilities for providing the replacement real estate referred to Article 61.<sup>15</sup>

The recommendation should also be accompanied by certain attachments including: a ruling on the siting of the investment project; a map of the expropriated area specifying the surface area and borders of the real estate or the parts thereof included in that area (if more than 50% of a land parcel will be expropriated, the map is required to show both the area to be expropriated and the remaining area); a certified copy of the land register attesting to the right to ownership of the real estate concerned, along with records of any liens on the real estate; if the land is not registered, a certified copy or copies of documents attesting to the right of ownership and existing liens, or a certification from the state notary office to the effect that the real estate in question is not entered into any land register and an extract from the land and building records identifying the land owner may be provided instead.<sup>16</sup>

The expropriation recommendation is reviewed and an expropriation ruling is issued by the offices of the district level government. Under Article 53, the expropriation ruling should specify in particular:

1. The object of expropriation and the property rights encumbering the expropriated real estate which remain in effect;
2. The location and area of the real estate and the name of its owner in accordance with the guidelines for making entries in the land register, along with information on the applicable land register, and in the event of the absence of mention of the real estate in the land register or in archival documents, the name of the existing possessor according to the actual status of possession;
3. The name of the recommending person and the purpose of the expropriation;
4. The amount of compensation;
5. The names and addresses of persons eligible for the compensation;
6. A detailed factual and legal rationale;
7. An instruction on means of appeal.<sup>17</sup>

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<sup>15</sup> *Id.* art. 51(1-7).

<sup>16</sup> *Id.* art. 51(1-4).

<sup>17</sup> *Id.* art. 53.1(1-7).



If the expropriation ruling disallows the expropriation recommendation, the office issuing the ruling must delete from the land register or land records the entry or notice on the initiation of expropriation proceedings.<sup>18</sup>

The law also contains detailed provisions governing compensation. A lump sum payment<sup>19</sup> based on the market value of the expropriated land<sup>20</sup> and structures on the land<sup>21</sup> is required within 14 days of the time when the expropriation ruling becomes final.<sup>22</sup> Upon consent by the land right holder, the assessment of compensation may be delayed for a period of three months after the expropriation ruling becomes final. If compensation is postponed, the agency issuing the expropriation ruling is required to issue a separate compensation order.<sup>23</sup> Delays in the payment of compensation by the state are subject to penalties under the Civil Code.<sup>24</sup>

The value of the land is calculated in terms of the day upon which the expropriation ruling is made<sup>25</sup>, and changes in the legal status of the real estate made after the initiation of expropriation proceedings have no effect on the form and amount of compensation.<sup>26</sup> When the need arises, experts may be consulted to determine the level of compensation.<sup>27</sup>

In determining the compensation for expropriated agricultural or forest land, allowance is made for its location, quality of soil or timber stand, the presence of equipment and facilities promoting agricultural production or silviculture, and land reclamation measures.<sup>28</sup> In determining compensation for other types of land, allowance is made for its location and degree of development.<sup>29</sup>

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<sup>18</sup> *Id.* art. 52.3.

<sup>19</sup> *Id.* art. 55.1.

<sup>20</sup> *Id.* art. 56.1.

<sup>21</sup> *Id.* art. 60.1. Compensation for permanent structures and facilities linked to the land should correspond to the cost of reproducing them minus the extent of their depreciation on expropriation day. *Id.*

<sup>22</sup> *Id.* art. 55.2.

<sup>23</sup> *Id.* art. 55.3.

<sup>24</sup> *Id.* art. 55.4.

<sup>25</sup> *Id.* art. 53.3.

<sup>26</sup> *Id.* art. 52.2.

<sup>27</sup> *Id.* art. 56.4.

<sup>28</sup> *Id.* art. 56.2.

<sup>29</sup> *Id.* art. 56.3.

On demand of the owner or right holder of expropriated land, compensation may take the form of substitute real estate rather than cash.<sup>30</sup> The value of the replacement real estate should correspond to the value of the expropriated real estate, with any differences in value equalized through cash compensation.<sup>31</sup> The value of the replacement real estate is determined according to the same guidelines used for determining compensation for expropriated real estate.<sup>32</sup>

Several provisions related to compensation are of particular relevance to agricultural land. Under Article 59.1, right holders of expropriated agricultural land under cultivation at the time of expropriation are also entitled to lost profits calculated based on the current market prices of their crops minus potential expenditures of the owner on harvesting operations.<sup>33</sup> The land right holder is also entitled to reimbursement for the expense of implementing agrotechnical operations for the crop under cultivation.<sup>34</sup> If the expropriation ruling becomes final during the growing season and no more than five months before the time of harvest, the land will remain in the hands of the land right holder until the crops can be harvested.<sup>35</sup>

For perennial cropland, farmers are additionally entitled to compensation for outlays owing to the land's location, outlays on cultivation until the first harvest, and the value of the proceeds forfeited owing to the expropriation until the end of the entire fruit-bearing period. This amount is offset by the total of annual depreciation over the years of cultivation of the plantation from the first year of fruit-bearing until the day of expropriation.<sup>36</sup>

The provisions of the Polish Law on Land Use Management and Expropriation of real estate provide an example of the level of detailed consideration required for an adequate legal framework governing compulsory acquisition of agricultural land. On its surface, it appears to provide a level of security to farmers with respect to expropriation of their land that far surpasses some other ECA countries. Since the enacting of the Law in 1991, however, expropriation of land in Poland has been minimal, providing little opportunity to test its practical effectiveness.

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<sup>30</sup> *Id.* art. 61.1.

<sup>31</sup> *Id.* art. 61.2.

<sup>32</sup> *Id.* art. 61.3.

<sup>33</sup> *Id.* art. 59.1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* art. 68.

<sup>36</sup> *Id.* art. 59.2.

### III. Compulsory Acquisition -- Legal Frameworks in Developed and Developing Economy Countries

Although compulsory acquisition systems vary depending on each country's balancing of public needs with private interests, all effective compulsory acquisition systems share three important characteristics. First, expropriation of land is restricted to circumstances that serve public purposes. Second, the basis for compensation, typically the market value of the land to be expropriated, is defined in law. Finally, procedural rights of interested parties, including notice, the right to be heard, and the right to appeal, are guaranteed by law. This section provides a series of comparative examples from both developed and developing countries to identify the components of an effective compulsory acquisition system.

#### A. Public Purpose Doctrines

To some extent, all laws governing compulsory acquisition restrict the state's right to expropriate land to circumstances that serve public purposes.<sup>37</sup> Varying definitions of "public purposes" embody each society's balance of the rights of private landholders with the public's land requirements. In general, expropriation statutes define the circumstances under which the state may expropriate land in one of three ways: through general guidelines, a list of provisions for specific needs, or a combination of the two.<sup>38</sup>

General guidelines state merely that expropriation requires a public purpose, leaving considerable discretion to the executive power of the state and the judiciary's power of statutory interpretation.<sup>39</sup> Countries employing this approach include the United States, the Republic of the Philippines, Vietnam, and colonial Hong Kong. The Constitutions of both the United States and the Philippines both state that private property shall not be taken for public use without just compensation.<sup>40</sup> Rich bodies of case law have developed in each country to define the specific meaning of the term "public use."<sup>41</sup> Vietnam also adopted this approach in its 1993 Land Law.

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<sup>37</sup> MICHAEL KITAY, LAND ACQUISITION IN DEVELOPING COUNTRIES 40 (1985).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Note that the terms contained in statutes may vary: *Public* may become *social, general, common, or collective*. Similarly, *purpose* may be replaced by *need, necessity, interest, function, utility, or use. Id.*

<sup>40</sup> CONSTITUTION OF THE UNITED STATES art 5; CONSTITUTION OF THE PHILIPPINES art. 3, sec. 9.

<sup>41</sup> For example, in the United States, constitutional language governing compulsory acquisition of land has been interpreted to restrict the government's power of eminent domain to takings of land for public uses. In *Berman v. Parker*, 348 U.S. 26 (1954), however, the United States Supreme Court restated "public use" as "public purposes" in holding that the District of Columbia could convey condemned land to private developers because the developers' plan to clear slums and make the city more attractive served a public purpose. In *State of Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Supreme Court held that the redistribution of land from a small number of large owner-lessors to the hands of lessees fit within the public purpose doctrine.

Article 27 of the law states “[W]here necessary, the State shall, for purposes of national defense, security, national or public interest, recover possession of land which is currently being used.”<sup>42</sup> Prior to its return to Chinese rule, the Hong Kong Crown Lands Resumption Ordinance permitted the colonial government of Hong Kong to acquire land, but only for public purposes.<sup>43</sup>

Under German law, both the Federal Government and the *Laender* (states) may expropriate land for the “common benefit”. Examples of the allowable purposes for expropriation include the construction of roads, airports, power stations, or cable railways. Expropriation may proceed only under circumstances where no alternative means of acquiring the needed land exists.<sup>44</sup>

List provisions, on the other hand, limit expropriation of land to purposes such as schools, roads, and government buildings, that are explicitly identified as public in legislation.<sup>45</sup> In general, list provisions leave much less discretion to the executive and judicial branches of government than general guidelines.<sup>46</sup> List provisions may be either exclusive or non-exclusive.<sup>47</sup> Exclusive lists provide a comprehensive list of public purposes beyond which the executive may not expropriate land.<sup>48</sup> Non-exclusive lists, however, are typically combined with general guidelines, and expropriation is allowed where the purpose either falls within the list or meets the general guidelines.<sup>49</sup>

Due to their inflexibility, few countries employ exclusive lists. Some countries, however, use exclusive lists to define the circumstances under which quick-takings are permissible. Quick-taking provisions permit the government to assume possession of land before compensation is set or paid under a limited set of circumstances.<sup>50</sup> Guatemala’s quick-taking provisions, for example, authorize quick-takings in cases of war, public calamity, serious disturbance of the peace, and whenever lands are needed for construction of roads or highways.<sup>51</sup>

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<sup>42</sup> Land Law of Vietnam, art. 27 (1993).

<sup>43</sup> LAWS OF HONG KONG 124 [hereinafter LHK].

<sup>44</sup> Dr. Christian Grimm, *Rural Land Law in Germany* (May 1998) (unpublished manuscript on file with Rural Development Institute) [hereinafter Grimm].

<sup>45</sup> Kitay, *supra* note 37, at 40.

<sup>46</sup> *Id.* at 40-41.

<sup>47</sup> *Id.* at 41.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

That even the scope of some of these categories may be open to debate illustrates the difficulty in employing an exclusive list approach.

Brazil and Mexico provide examples of countries that combine non-exclusive lists with general guidelines in a unified approach to expropriation. Brazil recognizes two purposes that justify compulsory acquisition: (a) "public utility," defined by a moderately specific list to include national defense, public health, construction of public works, and achievement of state monopolies; and (b) "social interest," a general guideline that permits acquisitions for purposes aiding in achievement of the "social function of property," which includes the distribution of property.<sup>52</sup>

Mexico's expropriation statute contains a detailed list of uses that meet the "public utility" standard, but also includes a final catch-all provision that allows expropriation for "all other cases provided for by special laws."<sup>53</sup> This provision allows legislative expansion of the definition of "public utility."<sup>54</sup>

In Italy, under law 2359 of 1865 and law 359 of 1992, state, regional, and municipal authorities all have the power to expropriate land. Land may be expropriated based on the following reasons: for reclamation of items of artistic, historical, or archaeological value; to break up large latifundia<sup>55</sup>; and for the construction of public interest works or council houses. Law 2359 of 1865 defines the meaning of "public interest works," including highways, schools, public parks, and stadiums. The same laws establish specific procedures for compulsory acquisition of land. Most expropriations of agricultural land occur when municipal governments adopt urban development plans that require the rezoning of agricultural land into urban land. Such rezoning is presumed to be in the public interest.<sup>56</sup>

A broad survey of both developed and developing countries indicates that the public purpose doctrine most often includes the following permissible uses:

- Transportation uses including roads, canals, highways, railroads, sidewalks, bridges, wharves, piers, and airports;
- Construction of public buildings including schools, libraries, hospitals, factories, churches, and public housing;

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<sup>52</sup> *Id.* at 41-42. The latter includes redistributive land reform, important in the setting of many traditional developing countries. See generally Timothy Hanstad, *Philippine Land Reform: The Just Compensation Issue*, 63 WASHINGTON LAW REVIEW 417 (1988). Compare *State of Hawaii Housing Authority v. Midkiff*, *supra* note 41.

<sup>53</sup> Kitay, *supra* note 37, at 42.

<sup>54</sup> *Id.*

<sup>55</sup> Once again, the theme of land reform, affecting large privately-owned estates. See Hanstad, *supra* note 52.

<sup>56</sup> Danilo Agostini, *Rural Land Law in Italy* (May 1998) (unpublished manuscript on file with Rural Development Institute).

- Military purposes;
- Public utilities such as water, sewage, electricity, gas, irrigation and drainage works, and reservoirs;
- Public parks, playgrounds, gardens, sports facilities, and cemeteries;
- Agrarian reform.<sup>57</sup>

Other permitted uses in particular countries may include low-income housing, industrial or commercial enterprises owned by public entities, and even takings for use by private businesses.

This partial list of activities indicates the importance of defining the scope of the public policy doctrine. Except where a country employs an exclusive list of circumstances under which expropriation is permissible, statutory expressions of the public purpose doctrine will always require further definition and clarification through judicial interpretation. This is especially true in countries with expropriation statutes that contain broad general guidelines. Without further clarification, such broad guidelines give government entities wide discretion to expropriate land without checks on their power.

## **B. Valuation and Compensation**

Most expropriation laws define the level of compensation for expropriation as “fair market value” or “just compensation.”<sup>58</sup> Different expropriation schemes, however, have developed divergent methods for determining the level of compensation that equals market value or meets the “just compensation” standard. This determination can have important efficiency and equity considerations.

Article V of the United States Constitution requires “just compensation” for all takings of private property.<sup>59</sup> The Philippine Constitution similarly requires that “payment of just compensation must be made.”<sup>60</sup> Brazil’s Constitution also contains a “just compensation” clause.<sup>61</sup> The underlying goal of “just compensation” is to leave the owner or user of the expropriated land in the same economic circumstances as before the expropriation; he should neither be enriched nor impoverished. A survey of developed and developing country practices with respect to compensation evidences a variety of methods of determining what is “just

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<sup>57</sup> Kitay, *supra* note 37, at 43-44. Expropriation of land for agrarian reform is generally permitted where the land has been insufficiently exploited or to expropriate the excessive portions of very large, privately owned plots.

<sup>58</sup> *Id.* at 50. See generally, Hanstad, *supra* note 52.

<sup>59</sup> CONSTITUTION OF THE UNITED STATES art 5.

<sup>60</sup> CONSTITUTION OF THE PHILIPPINES art. 3, sec. 9.

<sup>61</sup> CONSTITUTION OF BRAZIL art. 153, para. 22 (am. 1) (1967).

compensation.” The valuation and compensation schemes of several countries are detailed below.

In the United States, the principle for determining just compensation is the full market value of the land to be taken -- the amount a willing buyer would pay a willing seller. Payment is made in cash.<sup>62</sup> The determination of market value, however, does not reflect any changes in the value of the property arising from the taking itself.

Provisions of Italian law governing compensation for expropriation of agricultural land offer a high level of compensation and strong incentives for landowners to accept the compensation offered. In the case of expropriation of agricultural land through rezoning for urban uses, once a development plan has been approved, the municipality makes an offer of compensation to each of the landowners whose land will be expropriated. The basis for the offer of compensation for expropriation of rural land in Italy is the Agricultural Middle Value (VAM), a value established annually for each agrarian region that varies depending on the types of crop and soil fertility.<sup>63</sup> The VAM is intended to be roughly equivalent to average market value of the expropriated land. Each landowner has 30 days to decide whether to accept or reject the offer.<sup>64</sup>

For those land owners agreeing to accept the offer of compensation, the exact amount of compensation received will vary depending on their legal relation to the land. Non-cultivating landowners are entitled to 1.5 times the VAM. Tenants are entitled to 2 times the VAM. Owner-operators are entitled to 3 times the VAM.<sup>65</sup> This increase in compensation over the VAM is intended to provide an incentive for landowners to accept the offer of compensation without appeal to the courts.

If landowners are not satisfied with the offer of compensation, however, they may appeal to the Civil Courts. In such a case, the appeal is decided by the Provincial Expropriation Committee, which consists of farmers' union officers, representative agents of agricultural co-operatives, and regional executives. The Committee determines the level of compensation to be offered based on an analysis of the land market and the VAM of the land to be expropriated. The deliberations of the Committee are closed to the public, and landowners do not have the right to present testimony.<sup>66</sup>

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<sup>62</sup> See *Shoemaker v. United States*, 147 US 282 (1893); *Riley v. District of Columbia Redevelopment Land Agency*, 246 F2d 641 (D.C.Cir. 1957).

<sup>63</sup> The level of compensation for urban land differs from rural land and is based on the following formula: the market value of the land ( $V_m$ ) plus ten times the cadastre income (RD) divided by two ( $(V_m + 10RD)/2$ ). In practice, this typically leads to compensation that is approximately 40% lower than the market value of urban land. See Agostini, *supra* note 56.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Once compensation has been determined by agreement or decision of the Provincial Expropriation Committee, an expropriation order is issued and ownership of the land is transferred from the private land owners to the expropriating agency. If the landowner accepts the compensation offer of the expropriating agency or is satisfied with the compensation determination rendered by the Provincial Expropriation Committee, the landowner will receive the full amount of compensation prior to occupation of the land. If, however, the landowner remains unsatisfied with the amount of compensation offered by the Committee, he may appeal to the Civil Courts. In such cases, the compensation amount determined by the Committee will be deposited in the landowner's bank account pending resolution of the appeal. If the court determines that the landowner is entitled to additional compensation, it must be provided by the expropriating agency following the appeal.<sup>67</sup> It is unclear whether the court has the right to reduce the compensation ordered by the Expropriation Committee and require the landowner to refund a portion of the money.

In Great Britain, all owners, lessees, and occupiers are entitled to compensation under the Compulsory Purchase Act (1965) and the Acquisition of Land Act (1981).<sup>68</sup> Compensation can be determined either through agreement between the acquiring authority and all interested parties or through an assessment of compensation by the Lands Tribunal. If the parties cannot agree, the Lands Tribunal assesses compensation according to the following principles: (a) no allowance is made for the fact that the acquisition is compulsory; (b) the value of the land shall be taken to be the amount for which a willing seller would have sold the land on the open market; (c) the special suitability or adaptability of the land for any purpose shall not be taken into account if statutory approval would have been required for that purpose; (d) any item of value depending on the use of any of the property in a manner that is illegal, detrimental to the health of the occupants, or detrimental to public health shall be excluded; and (e) if it is impossible to determine the market value for a particular piece of land due to the lack of a market for the purpose of the land, the compensation may be based on the reasonable cost of reinstating the occupier with a comparable piece of land.<sup>69</sup> Under certain circumstances, compensation based on depreciation in the value of land not acquired may also be available.<sup>70</sup> In addition to this compensation, if a person maintaining an interest in agricultural land with at least three years remaining loses this interest through a compulsory acquisition, he will be entitled to an additional farm loss payment if he begins to farm another agricultural unit within Great Britain within a three year period.<sup>71</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> The only exception to this rule is a short-term tenant with a term of one month or less. England's Compulsory Purchase Act, 1965, sec. 1; England's Acquisition of Land Act, 1981, sch. 1.

<sup>69</sup> England's Land Compensation Act, 1961, sec. 5.

<sup>70</sup> KEITH DAVIES, LAW OF COMPULSORY PURCHASE AND COMPENSATION 136 (4th ed. 1984).

<sup>71</sup> England's Land Compensation Act, 1973, sec. 34.



In Germany, detailed rules govern the process of applying for the right to expropriate a piece of land, the preparation and holding of a public hearing, the final decision to expropriate, and the amount of compensation to be made. For agricultural land, the compensation equals the current market value of the land to be withdrawn. In the case of division and transversal of fields, additional compensation must be paid based on the following: (a) increased time required for road travel and preparation of machinery; (b) damage due to detours; (c) damage due to increased boundaries on the land; (d) damage caused by worsened alignment of the land. If there is a dispute regarding the amount of compensation to be paid, the landowner retains the right to appeal to the civil courts.<sup>72</sup>

In colonial Hong Kong, where the government retained ownership of all land but leased it to individuals for a period of 75 years, a Lands Tribunal first determined whether compensation was appropriate and then set the amount of compensation to be paid. The appropriateness of compensation was determined on the basis of: (a) the value of the land and buildings on the date of resumption; (b) the value of any easement; (c) the amount of loss or damage due to the severance of the land or building from any other land of the claimant; (d) the amount of damage or loss due to removal of the business; and (e) the expenses reasonably incurred for moving.<sup>73</sup> When deemed appropriate, the Lands Tribunal was guided by the following criteria and rules in determining the amount of compensation: (a) the nature and existing condition of the property; (b) compensation was not awarded for anything added to the property after notice was given; (c) compensation was not awarded for illegal use; (d) no additional allowance was granted based on the fact that the resumption was compulsory and not voluntary; (e) no allowance was made for the fact that the land was in a specially zoned area; (f) no compensation was to be given for use not permitted under Crown lease; (g) no compensation was allowed for expectancy of grant renewal or continuance of the lease; and (h) the amount of compensation will equal the amount the land could be sold for by a willing seller on the open market.<sup>74</sup>

In Brazil, the 1956 Expropriation Law sets out the following determinants of "just compensation": (a) the assessed value for tax purposes; (b) acquisition costs of the property; (c) profits earned from the property; (d) location of the property; (e) state of preservation of the property; (f) insured value of the property; (g) market value over the past five years of comparable property; and (h) valuation or depreciation of remaining property after the sought land is taken.<sup>75</sup>

Several countries use tax valuation as a guide for compensation. In Mexico, the landowner is entitled to the amount declared or accepted by the owner for tax purposes, subject

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<sup>72</sup> Grimm, *supra* note 44.

<sup>73</sup> LHK, *supra* note 43 at 124:10.

<sup>74</sup> *Id.*

<sup>75</sup> Brazil's Expropriation Law (1956), noted in Kitay, *supra* note 37, at 50.

to adjustment for changes in value since the previous tax valuation.<sup>76</sup> In Singapore, the declared tax value is the ceiling for compensation, while in Guatemala City the ceiling is the declared tax value plus 30%.<sup>77</sup> In takings for land reform purposes in El Salvador in 1980, declared tax value in 1976 and 1977 was used.<sup>78</sup>

The amount of compensation awarded to owners or users of expropriated land can have important efficiency and equity implications for other owners.<sup>79</sup> Undercompensation discourages land owners from making improvements to their land in fear that they will be unable to recover the value of those investments upon expropriation.<sup>80</sup> Another effect of undercompensation is that banks will be less willing to loan money on certain types of property that they deem to be more likely to be expropriated.<sup>81</sup> Even full market value may undercompensate land owners by failing to take into account any values attached to the land that are not reflected in the market price.<sup>82</sup> Although these values are difficult to determine with any degree of accuracy, they may be accounted for by adding a percentage premium to awards for residences or other properties that have special significance to owners, or through additional compensation for relocation or disturbance costs.<sup>83</sup> A pattern of overcompensation, on the other hand, can discourage legitimate public takings.

Special problems determining compensation based on "market value" may arise in ECA countries where land markets have long been absent and are only beginning to develop. However, even if there have been few or no sales of agricultural land in a particular country setting, other approaches to determining a fair level of compensation may exist. If at least a lease market exists for agricultural land, rental payments will represent a flow of income from the land that can be capitalized; likewise, the gross value of production minus normal production expenses represents a net flow of income for an owner-operator, whose value can be

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<sup>76</sup> Kitay, *supra* note 37, at 51.

<sup>77</sup> *Id.*

<sup>78</sup> Basic Law of Agrarian Reform of El Salvador (Decree 153) 1980, art. 13.

<sup>79</sup> Jack L. Knetsch, *Land Use: Values, Controls and Compensation*, in *LAW AND ECONOMIC DEVELOPMENT: CASES AND MATERIALS FROM SOUTHEAST ASIA*, 306 (Euston Quah & William Neilson eds., 1993).

<sup>80</sup> *Id.* at 307.

<sup>81</sup> *Land Acquisition Act to be Amended Says Ministry*, THE STRAITS TIMES, Oct. 16, 1986, cited in Knetsch, *supra* note 79, at 307.

<sup>82</sup> *Id.* at note 79, 307.

<sup>83</sup> *Id.* For example, under the India Land Acquisition Act of 1894, owners were entitled to an award of an additional 15% of market value as *solatium* in consideration of the compulsory nature of the taking, see KITAY, *supra* note 37, at 51.

capitalized.<sup>84</sup> In addition, at least the option of receiving other land that is roughly equivalent can be offered to the owner of the land that is being acquired.

### C. Procedural Guidelines

Procedural guidelines for compulsory acquisition place important constraints on state power and protect the rights of landowners against arbitrary or capricious expropriation of land. Effective procedures include, at a minimum, notice of the decision to expropriate land, direct involvement of affected landholders in transparent proceedings, and an opportunity for appeal.

Most expropriation statutes contain provisions governing notice to landowners regarding the state's desire to expropriate land. The specific timing and form of notice, however, varies greatly by jurisdiction.

In Great Britain, the ministry, local government, or other authority seeking to acquire land must describe the land to be acquired by reference to a map, publish a notice of the acquisition in at least one local newspaper, and serve notice to all of the owners, lessees, and occupiers of land affected by the proposed acquisition order.<sup>85</sup>

In Hong Kong, notice is required to be published in the paper and a copy of the notice is required to be served on the owner (lessee) or affixed in a conspicuous place on the land if the owner can not be found.<sup>86</sup> Under the Crown Lands Resumption Ordinance, the land reverts to the Crown within one month of service of notice to the owner.<sup>87</sup>

In Peru, a judge must notify the property owner of the state's decision to expropriate his land within 24 hours of the time the final decision is made.<sup>88</sup> If the property owner cannot be located, notice is given by publication for three days in the newspaper of the provincial capital.<sup>89</sup> However, the time given to respond is far too short: if the owner fails to respond within three days of either the delivery of actual notice or the last publication date, the state's designation of the parcel to be expropriated and appraisal of its value is deemed accepted.<sup>90</sup> In Nicaragua, the landowner is notified through publication of a notice of the action in the *Public Register of*

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<sup>84</sup> See JAMES C. BONBRIGHT, *THE VALUATION OF PROPERTY* (1937) for a wide-ranging discussion of approaches to valuation for various legal purposes and based upon various kinds of factual data.

<sup>85</sup> England's Acquisition of Land Act, *supra* note 68, 1981.

<sup>86</sup> LHK, *supra* note 43, at 124:4.

<sup>87</sup> *Id.*

<sup>88</sup> Kitay, *supra* note 37, at 60.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

*Immovable Property*, which seems far too obscure a form of notice.<sup>91</sup> As these requirements illustrate, it is possible to craft notification provisions that are manifestly unfair.

Direct involvement of the land user in expropriation proceedings may also take a variety of forms.<sup>92</sup> In Great Britain, all of the recipients of the notice have a right to object to the order and the right to have their objections heard either publicly or before an appointed person. The Secretary of State makes the final decision as to whether to allow the order for acquisition to be made after reviewing all objections to the order. The Secretary must notify in writing the acquiring authority and each objector of his decision on the order and the reasons for the decision.

Italian compulsory acquisition procedures provide extensive opportunities for landowner involvement in the expropriation process. The procedures for rezoning of agricultural land into urban land, the most common type of agricultural land expropriation, are described below.

Under Law 2359 of 1865 and Law 359 of 1992, once an urban development plan has been drafted by the municipality, a copy of the plan indicating which parcels of land will be expropriated for public uses is posted in the municipality for 15 days. Landowners within the area to be rezoned are not provided with individual notice, but they may inspect the plan to determine the new zone designation of their property.

Affected land owners may then submit written observations in opposition of the plan. Oppositions are permitted on the following grounds: the municipality did not undertake sufficient analysis prior to announcing the plan; the expropriation could be achieved through other methods; or other areas could be expropriated involving less efficient farms. The municipality must answer all oppositions in writing, and may choose whether or not to alter the original urban development plan based on the observations submitted by landowners. The municipality is then required to submit the development plan to regional authorities, who have the authority to approve the plan as submitted or require changes by municipal officials. Expropriation may not proceed until the development plan has been approved by regional officials.

In Honduras, the landowner has the right to appoint one expert to a three-person committee that determines valuation.<sup>93</sup> In Brazil, the final determination of the amount of compensation is judicial, but each party has the right to appoint an assistant to the court-appointed expert who prepares an advisory report concerning the land's value.<sup>94</sup> In Nicaragua, a hearing is held at which the owner has the right to challenge the indispensability of the property

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<sup>91</sup> *Id.* at 61.

<sup>92</sup> *Id.* at 51.

<sup>93</sup> *Id.* at 61.

<sup>94</sup> *Id.*

and advance any “inadequate remainder” argument if the expropriation is partial.<sup>95</sup> Indonesia requires negotiation with the landowner before formal expropriation proceedings may begin.<sup>96</sup>

The right of appeal provides the landowner with an important check against administrative decision-making. Appeal rights vary substantially by jurisdiction, and may focus on the decision to expropriate (declaration), the decision of what to expropriate (designation), and the decision of how much to compensate (valuation).<sup>97</sup>

Appeals of the declaration, usually focusing on the existence of a true public purpose, are limited in many jurisdictions.<sup>98</sup> In the United States, significant deference is paid to declarations of public purpose, but challenges of the declaration are allowed where the expropriation appears to serve private interests more than public interests.<sup>99</sup> Mexico also permits landowners to challenge the declaration on the grounds that it serves private purposes more than public purposes.<sup>100</sup> Similarly, in Great Britain, a landowner has the right to appeal an acquisition order to the High Court on grounds that the ministry or local authority has exceeded the statutory powers in making or confirming a compulsory purchase order.

The designation is also reviewable in some jurisdictions. For example, in El Salvador, the court has the authority to review two issues: first, whether all or a part of the property is necessary and second, whether other property owners should share in the burden of the expropriation in question.<sup>101</sup> In Mexico, if the landowner challenges the designation, the expropriating agency bears the burden of proving that the designated property is “suited and necessary.”<sup>102</sup> In Indonesia, however, the designation is held to be final and non-reviewable.<sup>103</sup>

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<sup>95</sup> *Id.* An inadequate remainder is the remaining portion of the owner's property after a partial expropriation, where that portion is practically useless. Under Nicaraguan law, the owner has the right to compel expropriation of the entire property if a partial expropriation would result in an inadequate remainder.

<sup>96</sup> SUTANU BEHURIA, SOME ASPECTS OF LAND ADMINISTRATION IN INDONESIA: IMPLICATIONS FOR BANK OPERATIONS 6 (Asian Development Bank Economics and Development Resource Center Occasional Paper No. 10, 1994). Indonesia's compulsory acquisition practices, however, have been criticized by observers who note that they are state-dominated and coercive and as such hinder foreign investment, tenure security, and private investment in land. See WILLIAM THIESENHEUSEN ET AL., LAND TENURE ISSUES IN INDONESIA (Unpublished Agricultural Development Consultants, Inc. Report, 1997) (on file with the Rural Development Institute).

<sup>97</sup> Kitay, *supra* note 37, at 64.

<sup>98</sup> *Id.*

<sup>99</sup> COMPENSATION FOR COMPULSORY PURCHASE: A COMPARATIVE STUDY 150 (J.F. Garner ed., 1975). Examples of such circumstances include when the expropriation is for a marginally public purpose such as a sports facility or an industrial development project that fails to provide for retention of sufficient public control over the project. *Id.*

<sup>100</sup> Kitay, *supra* note 37, at 64.

<sup>101</sup> *Id.* at 65.

<sup>102</sup> *Id.*

The valuation issue has been widely held to be reviewable.<sup>104</sup> In various jurisdictions, judicial review of the original compensation determination has been permitted based on procedural issues, fraud or error, or general grounds.<sup>105</sup> In colonial Hong Kong, compensation was the only issue that could be appealed.<sup>106</sup>

#### **IV. Checklist of Potential Legal Impediments and Solutions**

This section provides a list of potential legal impediments to the development of an effective framework governing compulsory acquisition of agricultural land in ECA countries. Each impediment is followed by potential solutions derived from the comparative experience discussed in the previous section of this chapter. The potential solutions must, of course, be viewed within the context of each country's general legal and institutional framework as well as the country's customary law. Not all solutions will be appropriate for every ECA country.

**Potential Impediment: Appropriate legal rules governing compulsory acquisition of land do not exist.**

##### **Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing compulsory acquisition (for a checklist of items to be included in such legislation, see section V of **Chapter 11, *Compulsory Acquisition***).

**Potential Impediment: The purposes for which land may be acquired have not been clearly identified.**

The state's ability to expropriate land from private landowners or land users represents an extraordinary power that must be restricted to certain clearly defined important purposes.

##### **Potential Solutions**

- Allow compulsory acquisition of land only where it serves public purposes.
- The scope of the public purposes doctrine can be defined through broad guidelines supplemented by judicial interpretation or through list provisions. If list provisions are employed, individual countries must determine whether the list provided should

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See, LHK, *supra* note 43, sec. 124.

be relatively exclusive or non-exclusive. In areas where insufficient administrative capacity or the presence of corruption might contribute to excessive land takings, exclusive lists should be employed. Where administrative capacity is strong and corruption is not a substantial problem, however, non-exclusive lists may be more appropriate.

**Potential Impediment: Legal standards for compensation are not adequate.**

The lack of detailed and reliable compensation standards for compulsory acquisition can depress land values and discourage land transactions, especially in areas where expropriation is more likely, such as peri-urban areas.

**Potential Solution**

- Legislation governing compulsory acquisition should specify not only that compensation is required, but also the detailed standard of compensation to be paid.

**Potential Impediment: The compensation standard results in less than market value.**

To have true tenure security on their land, farmers must be assured that they will receive compensation based on full market value in the event of expropriation. The lack of such assurance will dissuade farmers from making productivity-enhancing investments in their land for fear that they will not be able to recoup the value of their investments if their land is expropriated. It will also dissuade banks from issuing mortgages on land in areas where takings are likely, since the bank will not be able to recover the full value of the property from the landowner if the land is taken.

**Potential Solutions**

- Legislative provisions should ensure that full market value is the basis of compensation for all land expropriations.
- In the absence of a fully developed land market, the true market value of any particular piece of land may be difficult to determine. In such settings, alternative approaches to determining compensation may need to be included, such as the capitalized value of rents or the net value of production. A formula to determine compensation such as Italy's VAM, established annually for each agrarian region and based on types of crop and soil fertility, may be considered a variant of the latter approach. The option of receiving a comparable piece of land should also be offered to the expropriated landowner in such settings (Great Britain).<sup>107</sup>

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<sup>107</sup> In Great Britain, in special circumstances where a market is lacking, this option is cast in terms of the reasonable cost of reinstating the occupier with a comparable piece of land. This is due to the fact that nearly all agricultural land in Britain is privately owned, and the expropriated party will therefore have to be given cash to buy

- Some countries, including several ECA countries, have adopted compensation levels that pay a premium above and beyond the market value of the land, such as lost profits. These actual losses may be difficult to accurately measure, but their payment will increase farmers' tenure security and encourage productive uses of agricultural land.

**Potential Impediment: Agencies authorized to acquire land are not clearly identified.**

Legislative provisions that authorize compulsory acquisition of land through overly broad pronouncements may encourage expropriation of land by a multitude of government agencies, causing substantial loss of land and uncertainty in all compulsory acquisition practices.

#### **Potential Solution**

- Implementing regulations should specifically identify those agencies and levels of government that have authority to acquire land and provide penalties for agencies that attempt to acquire land beyond their administrative power.

**Potential Impediment: The procedural rules governing compulsory acquisition are unclear.**

Procedural rules place important constraints on state power and provide confidence to land right holders by recognizing that an important right is being taken away.

#### **Potential Solution**

- Implementing legislation should include detailed guidelines governing compulsory acquisition procedures. Although specific provisions may vary, all procedural guidelines should, at a minimum, ensure notice to all affected land right holders, an opportunity to be heard, and the right to appeal.

**Potential Impediment: Compulsory acquisition rules or practices are unpredictable.**

Once detailed legislative provisions have been drafted, institutionalized oversight mechanisms must be established to ensure that such provisions are followed in practice. Without such mechanisms, the value of legislative provisions in protecting the rights of land right holders will be largely unrealized.

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comparable land on the market; but in settings where the state is likely to retain ownership of enough agricultural land to find a comparable piece of land in its own local land inventory, the option can be offered of receiving comparable land in kind.



## Potential Solutions

- Regional or local governments planning to expropriate land should be required to submit the following items to central (or at least next-higher level) officials prior to final approval of the expropriation: (a) a detailed plan for expropriation, including the amount, location, and proposed purposes for the land to be expropriated; (b) responses to any objections raised by affected land right holders during the expropriation process; (c) proof that all procedural requirements established in law have been satisfied; and (d) certification that compensation has been paid to all affected land right holders.
- Depending on the extent of population pressure on land in the particular ECA country, or on especially high quality or other characteristics of the land, there could be a complete ban on state acquisition of such land for any non-agricultural purpose, or at least a requirement that approval for the acquisition must be obtained at a very high level of the central government.<sup>108</sup>

## V. Checklist of Issues for Compulsory Acquisition Law and Implementing Regulations

1. Explicit statement that land may only be expropriated for public purposes and for compensation,<sup>109</sup>
2. List of specific purposes for which expropriation is permitted;
3. Description of the process through which specific purposes may be added to or subtracted from the list of permissible purposes;
4. Compensation equal to the market value of the land to be expropriated;
5. Next-best alternative to determine value (or give equivalent land) where there is no land-sale market;
6. Clear definition of the duties and responsibilities of public officials and bodies;
7. Clear definition of the rights of land right holders;
8. Establishment of clear procedures and standardized forms;

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<sup>108</sup> See the parallel discussion of private requests for change from agricultural to non-agricultural use of land in Chapter 6, *Land Use Regulation*. A general freeze on takings of agricultural land for non-agricultural purposes has been in force in China since the Spring of 1997, although RDI fieldwork suggests it may not be completely effective. *China: Land Use Controls Tightened*, CHINA DAILY, March 29, 1997, available in NEXIS, LEXIS News Library, CURNWS File.

<sup>109</sup> This language should be contained in both Constitutional provisions and the provisions of a law exclusively dedicated to the issue of compulsory acquisition.

9. Adequate notice provisions;
10. Time limits on actions by public authorities (with penalties for failure to meet limits);
11. Requirement that officials be forthcoming about the purpose for the expropriation and expropriation procedures;
12. Opportunities for the land right holder to challenge the decision to expropriate;
13. Opportunity for the land right holder to participate in processes and decisions that lead up to expropriation;
14. Provision of judicial or quasi-judicial bodies to provide independent review on the various issues; and
15. Minimal delay in payment of compensation.

## Chapter 12

# Women and Land

By Renée Giovarelli

### I. Introduction

In terms of equity, fairness and empowerment, it is of great importance that women have equal access to the package of land rights which is made available to men in each particular country. Although generally in the ECA women have access to land, their rights to land are often inferior to the rights of men, and they have inferior access to the land market. Before discussing existing restrictions on land rights for women, it is useful to clarify how land rights are understood. In the context of the present discussion, land rights have been defined as "legally and socially recognizable claims that are enforceable by external authorities such as village-based institutions or the nation state."<sup>1</sup> This definition includes multiple elements that are important to understanding the significance of gender in a system of land rights. Rights must be not only legally but socially recognized and not merely recognized but also enforceable. Both distinctions are important to an analysis of women's access to the land market.

Those legal rights which have the most impact on women are the ones related to intra-household issues, primarily women's right to land when the family structure changes through divorce, incapacity or abandonment of a spouse, death of a spouse, death of parents, or childbirth.

Following is a discussion of potential legal impediments to women's rights to agricultural land, both as they relate to access to the land market and to other land issues.

### II. Legal Issues Regarding Women's Rights to Agricultural Land in ECA Countries

#### A. Issuance and Registration of Land Titles or Other Legal Documents

Land rights are often legally described in terms of a household as a unit. This is true, for example, in the Kyrgyz Republic<sup>2</sup> and Uzbekistan.<sup>3</sup> When the household is the legal unit, a

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<sup>1</sup> REKHA MEHRA, WOMEN, LAND, AND SUSTAINABLE DEVELOPMENT 4 (International Center for Research on Women Working Paper No. 1, 1995); See generally BINA AGARWAL, A FIELD OF ONE'S OWN (1994).

<sup>2</sup> Regulations of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Right," Adopted by Resolution of the Government of the Kyrgyz Republic No. 632 (August 22, 1994).

woman's land use rights are generally associated with her marital status. Land titles or other documents are issued on a household basis and only the head of household is listed on the document and/or in the register. A head of household is almost always the eldest man in the house. There are three problems with this arrangement, which derive from the fact that the other household members, particularly adult women who have legitimate rights to the land, are not named on the legal documents:

1. The male head of household may be able to execute a transaction with the land without notifying other family members, thereby depriving them of the transaction proceeds as well as participation in the decision.
2. The male head of household could leave the household. During his absence, the other family members would not have the legal right or ability to rent or mortgage land or otherwise participate in the land market, thereby depriving these members of the household of the means for making the land produce income for them.
3. The rights of those farm members who are not formally listed in the register are unclear.

Note that custom and cultural traditions may mitigate these concerns. However, formal protection of clearly intended rights of family members may become necessary in a functioning land market.

Russian law provides that individuals, not households, receive land shares, and that land share certificates are registered individually.<sup>4</sup> Such a legal provision provides formal protection of individual, female land shareholders. However, Russian law provides that peasant farms are held in joint ownership and registered under the head of household.<sup>5</sup> The 1991 Law on the Peasant Farm does not require that all members of a farm family list their names on the application to register the farm.<sup>6</sup> Article 7 does state that the number of able-bodied members of the farm family must be indicated, but this provision was later invalidated.<sup>7</sup>

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<sup>3</sup> Law of the Republic of Uzbekistan "On Land" (June 20, 1990) (*as amended*).

<sup>4</sup> Resolution of the Government of the Russian Federation No. 86 "On the Procedure for Reorganization of Collective and State Farms" (December 29, 1991). Resolution No. 86 established the rights of members of collective farms, workers on state farms, and pensioners to receive land shares and property shares.

<sup>5</sup> CIVIL CODE OF THE RUSSIAN FEDERATION [hereinafter RF Civil Code] art. 257(1) establishes that peasant farms will belong to the members by right of joint ownership unless otherwise established by law or contract.

<sup>6</sup> R.S.F.S.R. "Law on the Peasant Farm" (*as amended* Jan. 5, 1991).

<sup>7</sup> Decree of the Presidential of the Russian Federation No. 2287, "On Bringing the Land Legislation of the Russian Federation into Conformity with the Constitution" (December 24, 1993).

Kyrgyz law provides that only one land share certificate is issued per family. The amount of land the family receives is calculated by multiplying the number of family members (including children) by the amount of the established area for a single land share.<sup>8</sup> It is unclear under Kyrgyz law whether individual members have a right to withdraw their land share, or sell or lease their land share. It is also unclear whether the head of the family, in whose name the certificate is registered, has more rights to the land than his spouse or children.

The registration procedure in the Kyrgyz Republic provides that the entry in the registration book should list the name of the head of the family and the number of family members, but does not require the registrar to document the names of the family members who hold a land share represented by the certificate.<sup>9</sup> Those members who are not listed lack secure legal rights to the land even if under customary law they are protected. In a transaction between the head of the family and a third party, the registered entry would only give notice to the third party of the number of family members that must consent, but no indication of who they are.

In Kazakhstan, one draft of the Land Code provides that property acquired during marriage will be held in common joint ownership, but does not provide for registration of that property in both owners' names. There are no provisions regarding co-management of the marital property. The household is the legal unit, with the head of the household controlling land transactions.<sup>10</sup>

In contrast, Czech Republic law provides that any object that was acquired by either spouse during their marriage, with several exceptions, is presumed to be held in undivided joint ownership.<sup>11</sup> The exceptions include: (a) property that was received by one of the spouses through gift or inheritance; (b) property that serves the personal needs or occupational needs of one of the spouses; or (c) property that was returned based on restitution legislation. Spouses may agree to extend or restrict the scope of their legally defined undivided ownership, but if this agreement regards real estate, the agreement must be in writing and registered in the real estate cadastre.<sup>12</sup> In any case, the agreement must be in the form of a notarial record (deed).<sup>13</sup> Both spouses are entitled to use and enjoy all property that is in their undivided co-ownership.<sup>14</sup>

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<sup>8</sup> Regulation of the Government of the Kyrgyz Republic "On the Procedure for Determining Citizens' Land Shares and for Issuance of Certificates Containing Land Share Use Rights," adopted by Resolution No. 632 (August 22, 1994). (In Chui Oblast, a land share certificate has been issued to every family member, but the Ministry of Agriculture and Water Resources does not recognize these certificates.)

<sup>9</sup> *Id.*

<sup>10</sup> Steven E. Hendrix, *Legislative Reform of Property Ownership in Kazakhstan*, 15 DEVELOPMENT POLICY REVIEW 159,164 (June 1996). There is a current Law "On Land" adopted by Presidential Decree in December 1995.

<sup>11</sup> CIVIL CODE OF THE CZECH REPUBLIC sec. 143. [hereinafter Czech Civil Code].

<sup>12</sup> *Id.* sec. 143(a).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* sec. 144.

## B. Separation of Commonly Held Property

Under Czech Republic law, there are two areas of potential concern regarding marital property. First, if one spouse wants to start a business with property that is in undivided co-ownership, the spouse who is the entrepreneur must obtain the consent of the other spouse. If permission is received, the court will terminate the co-ownership of the spouses.<sup>15</sup> Second, property that serves the personal needs or occupational needs of one of the spouses is presumed to be individually owned, not jointly owned.<sup>16</sup>

Both the provision which excepts from joint ownership property used to start a business and the provision which excepts from joint ownership property that involves the occupational needs of one of the spouses may have an effect on women's rights to agricultural land and other sources of livelihood. For example, the male head of a family farm (and a court) may view his wife's work as non-farm work because her duties revolve more directly around the home and children. In case of divorce, her livelihood may be taken from her if the land and non-land property are not considered to be joint property. One possibility would be to provide in law or legal regulations that for a family business (including a farm), the legal presumption is that both spouses hold the land and property in joint ownership unless the spouses otherwise specify in writing. The signature of both spouses should be required for such a contract.

Another potential impediment under Czech law relates to the division of property once there has been a divorce or the co-ownership is dissolved. If an undivided co-ownership is dissolved, either the parties must reach agreement as to division of the property or the court will settle the division of the property if either party petitions the court. If no settlement has been reached (by the parties or the court) within three years, then movable property will be divided according to whether the property has been used by one spouse exclusively. All other movable and immovable property will be held in divided co-ownership (common share ownership), and the shares of each co-owner will be equal.<sup>17</sup> Again this provision may discriminate against women who, while married, did not use certain farm tools, namely mechanized tools. The husband, for example, may have used a tractor (movable property) exclusively. If the woman's share of the property includes much less expensive tools, she will be at a great disadvantage in starting a new farm or continuing to farm. There should be a legal presumption that family business property will be divided equally between the spouses.

A related issue under Czech law is that the court may dissolve co-ownership during the marriage if one person petitions the court for "important reasons," particularly if the court finds that further continuation of co-ownership would be "inconsistent with proper morals."<sup>18</sup> This

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<sup>15</sup> *Id.* sec. 148(a).

<sup>16</sup> *Id.* sec. 143(a).

<sup>17</sup> *Id.* sec. 149

<sup>18</sup> *Id.* sec. 148(2).

language is very vague and gives the court enormous discretion. Either party should have the legal right to partition jointly owned property and withdraw land and property in kind for any reason.

Under Romanian law, if a divorced couple decides to physically separate, all assets must be divided equally. The house or apartment must usually be sold, with the proceeds divided equally. Unfortunately, there is a severe housing shortage in Romania, and the strict requirements of the community property law often place a divorced couple in a situation where they must continue to live together because neither can afford to leave and purchase other housing with only half of the proceeds from their common house.<sup>19</sup> This problem, of course, arises with farm housing as well as non-farm housing.

### **C. Withdrawal from Peasant Farms**

In several countries, legal provisions provide that members of peasant farms may not withdraw land and non-land property in kind when they withdraw from a peasant farm. The person withdrawing from the farm has a right to receive monetary compensation commensurate with her participatory share, but no land or other property. Both Russia and the Kyrgyz Republic have such a provision in the Civil Code.<sup>20</sup>

Even without such a specific provision, regulations on minimum land plot size<sup>21</sup> can have the same effect. The result of such provisions may be that women who wish to leave a peasant farm enterprise will not be able to continue farming.

Even though the foregoing legal provisions are framed in gender-neutral language (stated so as to be equally applicable to men and women), they may have a severe adverse impact on women, especially in circumstances such as divorce.

### **D. Land Transactions**

Although some form of consent is generally required for disposition of property held in common ownership in ECA countries, written or formalized consent by both property owners may not be specified. Requiring written consent more adequately protects married women who are less likely than their husbands to initiate land transactions. Moreover, requiring written consent by both owners-in-common more adequately protects the interests of an innocent third

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<sup>19</sup> Nicki Negrau, Symposium, *The Status of Women in New Market Economies: Living in Post-Communist Romania*, 12 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 117, 131-32 (Fall, 1996).

<sup>20</sup> RF Civil Code, *supra* note 5, art. 258; CIVIL CODE OF THE KYRGYZ REPUBLIC, art. 278. [hereinafter Kyrgyz Civil Code].

<sup>21</sup> See Chapter 7, *Land Transactions*.

party; otherwise the non-signing owner could later attempt to invalidate the transaction by claiming she did not give the requisite (informal) consent.

Articles 246 and 247 of the Russian Civil Code provide that the possession, use, and disposition of property held in common ownership (common share or common joint ownership) will be effectuated by an agreement of all participants. However, written agreement or formal consent is not required.

Article 272 of the Kyrgyz Civil Code requires consent for disposition of property held in joint ownership, but does not require written consent.

The Czech Republic Civil Code provides that routine matters concerning things jointly owned may be handled by either spouse (only spouses can hold land in joint ownership), but that in other matters, consent of both spouses is required. Without consent of both spouses, the act is legally invalid. Written consent is not required.<sup>22</sup>

Section 149(a) of the Czech Republic Civil Code does provide for written agreement when two spouses contract regarding use and disposition of real estate in the following circumstances: (a) if an agreement between two spouses is reached regarding extending or restricting the scope of their legally defined undivided co-ownership or on the management of their joint property; or (b) if an agreement is reached regarding settlement of their undivided property upon dissolution of their marriage. The written agreement must be registered in the real estate cadastre.

The issue of requiring consent, but not requiring written consent, appears in many draft laws RDI has reviewed, including draft land codes, draft mortgage laws, and draft laws on turnover of agricultural land.

### **E. Inheritance of Land**

Not all ECA countries have formal rules on inheritance. In some countries, customary law is followed, and in Central Asia, Islamic law may be a factor. Under Islamic law as practiced in some countries, daughters might only inherit half as much as sons.<sup>23</sup>

In Uzbekistan, although article 46 of the constitution states that men and women have equal rights, in practice and under customary law women might not inherit agricultural land. In some cases, families with no sons receive less land from the collective farms because under customary law, land is not passed to daughters.<sup>24</sup> Without formal rules regarding inheritance or

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<sup>22</sup> Czech Civil Code, *supra* note 11, sec. 145.

<sup>23</sup> Catherine Besteman, *Access to Land*, in *GENDER AND AGRICULTURAL DEVELOPMENT* 18, 24 (Helen Kreider Henerson & Ellen Hansen eds., 1995).

<sup>24</sup> During field research conducted in Uzbekistan, collective farm leaders stated directly that they took the gender of children in a family into account when determining the size of land allotments a family would receive.



land distribution, individuals who control land (collective farm leaders and local government officials) are free to inequitably distribute land based on informal rules.

Formal inheritance rules are provided in the Civil Code of the Czech Republic. A person may inherit by operation of law or through a will or both. If a spouse inherits by operation of law, he or she will inherit half of the property and the children will equally divide the other half of the property.<sup>25</sup> Male and female children are treated equally under the law.<sup>26</sup> If a person inherits through a will, minor descendants must receive at least as much as constitutes their intestate share<sup>27</sup> in the estate, and adult descendants must receive at least as much as constitutes half of their intestate share in the estate.<sup>28</sup> The requirement that minor children must receive at least their intestate share could cause fragmentation of land.

### III. Gender Related Issues Regarding Agricultural Land in Developed Market Economies

#### A. Community Property Laws

The European civil law has devised a system of marital property known as community property that reflects an effort to give stronger property rights to women in marital relationships.<sup>29</sup> France, Germany,<sup>30</sup> and Italy<sup>31</sup> have community property laws. The system has also been adopted in nine U.S. states.<sup>32</sup> Several countries in Eastern Europe have also developed community property systems.<sup>33</sup> Underlying community property is the philosophical premise that husband and wife are equal. Together in marriage they form a kind of marital partnership analogous to a legal business partnership. The fundamental legal characteristic of this system is

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<sup>25</sup> Czech Civil Code, *supra* note 11, secs. 473-74.

<sup>26</sup> *Id.* sec. 473(1).

<sup>27</sup> The intestate share is the share that would have been received by operation of law in the absence of a will.

<sup>28</sup> Czech Civil Code, *supra* note 11, sec. 479.

<sup>29</sup> For a detailed discussion of community property in the United States, see GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 381-89 (1996).

<sup>30</sup> NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS 308 (2d ed. 1996).

<sup>31</sup> CIVIL CODE OF ITALY app. B (8).

<sup>32</sup> The nine states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE WESTERN RESERVE LAW REVIEW 83, 183 (1994).

<sup>33</sup> Romania, the Czech Republic, and Bulgaria have community property systems. Emily Stoper & Emilia Laneva, *Symposium: The Status of Women in New Market Economies: Democratization and Women's Employment Policy in Post-Communist Bulgaria*, 12 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 9 (Fall, 1996).

the categorization of all property, including land, as either "separate" property or "community" property.

Each spouse may own property in his or her individual right, called "separate" property. Generally, all property acquired by either spouse before marriage, along with property acquired by one spouse after marriage by either gift or inheritance, is that spouse's separate property. Each spouse has the full power to manage and dispose of his or her separate property.

All property acquired by either spouse during marriage, which is not by gift or inheritance, is "community" property. Thus, all earnings by either spouse during marriage and all assets acquired with such earnings, form part of the community property.

In the United States, all community property states now vest equal powers of management and disposition in each spouse, except that one spouse alone may have enhanced powers of management when the other spouse leaves, disappears, or becomes incompetent to act as a property manager.<sup>34</sup> Both spouses must participate in and provide written consent to transactions when they involve land, household necessities, and other specified assets.<sup>35</sup>

Some states in the U.S.<sup>36</sup> require the "equal division" of community property upon marital dissolution, meaning that the judge is required to "substantially," but not "mathematically," split the property in half.<sup>37</sup> Other states have "equitable division" systems, which allow the judge more leeway in awarding the community property.<sup>38</sup>

France also characterizes property as "separate" property or "community" property. Included in separate property are professional tools, and property that "by its nature" belongs to one or the other spouse. Specific marriage contracts are allowed, and these contracts can expand or diminish what constitutes community property.

Until 1985, French husbands had a disproportionate amount of management power over community property.<sup>39</sup> When the law was changed in 1985, it was decided that requiring both

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<sup>34</sup> Nelson, *supra* note 29, at 385.

<sup>35</sup> *Id.* Texas is the exception to the full management powers rule because it only allocates each spouse management over property that each would own if single.

<sup>36</sup> The states are: California, Louisiana, and New Mexico.

<sup>37</sup> Nelson, *supra* note 29, at 387. This system allows the judge some discretion in determining what "substantially equal" division of property means.

<sup>38</sup> "Equitable division" states are: Arizona, Idaho, Nevada, Texas, and Washington. Wisconsin was not included in either category.

<sup>39</sup> MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 120 (1989).

spouses to act together when disposing of property would be too cumbersome, so the French government gave each spouse the power to administer and dispose of community property by acting alone.<sup>40</sup>

However, if the property is necessary for a profession, the spouse practicing that profession has an exclusive administrative right over that property. Moreover, the signature of both spouses is necessary for the sale or lease of land. French law provides four means of enforcing the fair and equitable management of community property. First, either spouse may be liable to the other for damages for mismanagement of the community property.<sup>41</sup> (Note, however, that either spouse may dispose of community property represented by his or her earnings, after contributing to the household expenses.<sup>42</sup>) Second, if either spouse jeopardizes the family's best interest in the course of property management, the trial court can forbid the remiss spouse from disposing of community property in the absence of the consent of the other.<sup>43</sup> Third, a spouse may also seek a court order that allows him or her to exercise the property administration powers of the other.<sup>44</sup> Fourth, neither spouse may dispose of the "rights which assure the family's lodging and furniture" without the other spouse's consent.<sup>45</sup>

Under French law, no one may be forced to remain in joint ownership, and division of the jointly owned property through partition may always be obtained, unless there have been delays of partition through judgment of the court or agreement of the parties. A court may suspend partition for two years at the most if immediate realization will cause depreciation of the value of the undivided property or if one of the co-owners can begin an agricultural operation only at the end of a period of time.<sup>46</sup>

The principles of community property apply in Germany provided that they are specified in a contract or covenant of marriage that is certified by a notary.<sup>47</sup> Under such an agreement, all property either owned or acquired becomes joint marital property.<sup>48</sup> Some property can never be designated as joint, such as individual claims or personal rights, and other property can be

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<sup>40</sup> CIVIL CODE OF FRANCE, art. 1421.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* art. 1423.

<sup>43</sup> Glendon, *supra* note 39, at 122.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> CIVIL CODE OF FRANCE art. 815.

<sup>47</sup> Brashier, *supra* note 32, at 308. Community of property in Germany is called *Guetergemeinschaft*. Community property rights may be contracted for in Germany, but are not the presumption.

<sup>48</sup> *Id.*

subject to a reservation, or *Vorbehaltsgut*, made at the time of the agreement, designating it as separate property.<sup>49</sup>

In Germany, if a designation of community property is not made and the marriage ends by divorce or annulment, the "equalization of assets" occurs, which requires the division between the spouses of the total increase in assets<sup>50</sup> or acquisitions realized during the course of the marriage. In this case, therefore, community-property-like rules are applied as a matter of law, and no notarized contract between the parties is required.

Under Italian law, all property purchased after marriage is considered community property, unless both spouses agree otherwise in writing signed by a notary.<sup>51</sup>

The Japanese Civil Code provides that there are three types of spousal property: (a) property acquired before marriage, which is each spouse's separate property; (b) property acquired during marriage in each spouse's own name, such as salary or business income, and inheritances and gifts, which is also separate property; and (c) property that cannot be proved to belong to either spouse individually, which is presumed to be community property.<sup>52</sup> However, courts have held that the husband (normally the spouse with more income) has a duty of support, and wives can make claims against property after divorce.<sup>53</sup> This system relies heavily on the court for an equitable distribution of property and appears to significantly disadvantage women.

## B. Concurrent Rights to Land

In the United States, aside from community property, the legal system recognizes three basic forms of concurrent ownership of land: joint tenancy, tenancy in common, and tenancy by the entirety.<sup>54</sup> Tenancy by the entirety refers to joint ownership of land by married couples. To form either a joint tenancy or a tenancy by the entirety, owners must have the following characteristics: (a) they must have received their interest in the land at the same time; (b) they must have received their interest in the land from the same source; and (c) each tenant must have

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<sup>49</sup> *Id.* A separation of property, or *Guetertrennung*, may also be made where, at the time of covenant, it is agreed and notarized that the property will remain separate and that there will be no "equalization of assets" in the case of divorce.

<sup>50</sup> Pursuant to *Zugewinnngemeinschaft*, the value of gifts, inheritances, and premarital assets from the property to be shared (as long as their origin can be traced to premarital acquisition) is excluded from marital asset status. Glendon, *supra* note 39, at 132.

<sup>51</sup> Danilo Agostini, Rural Land Law in Italy (May 1998) (unpublished manuscript on file with the Rural Development Institute).

<sup>52</sup> CIVIL CODE OF JAPAN art. 762, pars. 1, 2.

<sup>53</sup> *Id.*

<sup>54</sup> The discussion in this section is taken in part from R. CUNNINGHAM ET AL., *THE LAW ON PROPERTY* 187-99 (2d ed. 1993).

an equal interest in the whole. All forms of common ownership also require that each person have an equal right to possess the whole. The main difference between these types of ownership is that of survivorship.<sup>55</sup>

A joint tenancy may be converted into a tenancy in common when one of the joint tenants conveys his or her interest to a third party. Tenancy by the entirety is only converted by a divorce. In some states the land converts to joint tenancy upon divorce and in other states the land converts to tenancy in common. Land held in any of these concurrent forms of ownership may be partitioned into separate parcels for each owner upon the request of any of the co-owners. In the absence of voluntary agreement by the co-owners as to how to divide the property, a co-owner may petition the court to accomplish the division.

### C. Inheritance of Land

In the United States, if land is held in joint tenancy or tenancy by the entirety, upon the death of one of the co-owners the surviving tenant becomes the sole owner of the entire estate. In contrast, tenants in common have no such mutual right of survivorship. Rather, the interests of each are subject to separate testamentary disposition upon death, and in the absence of a will are inheritable by the separate heirs of each tenant in common.<sup>56</sup>

In all community property jurisdictions in the United States, each spouse has statutory power to dispose by will of all his or her separate property and one-half of the community property.<sup>57</sup> If a spouse dies intestate, in some states all of the community property passes to the surviving spouse.<sup>58</sup>

In Germany, if one spouse dies intestate, the remaining partner is entitled to between one-half and all of the acquisitions realized during the marriage, depending on the number of descendants or other survivors entitled to share in the estate.<sup>59</sup>

In France, if there is no will, half of the community property must go to the spouse and half is passed by succession. One quarter of the half that is passed to the children is given to the surviving spouse in life tenancy.<sup>60</sup> For agricultural land, the surviving spouse or an heir can continue farming and can obtain the entire farm, even if the farm exceeds her portion of the

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<sup>55</sup> See *infra*, sec. III. C.

<sup>56</sup> Cunningham, *supra* note 54, at 188-93.

<sup>57</sup> *Id.*

<sup>58</sup> WASHINGTON REVISED CODE sec. 11.04.015(1)(a) (1997).

<sup>59</sup> Glendon, *supra* note 39, at 249.

<sup>60</sup> Isabelle Couturier, Rural Land Law in France (May 1998) (unpublished manuscript on file with the Rural Development Institute).

testate or intestate estate, if she had been farming prior to the death of the testator. The surviving spouse or other heir must pay the other beneficiaries an amount equal in value to their share of the farm.<sup>61</sup>

One further note regarding inheritance. None of the countries surveyed appear to have specific language mandating that male children and female children inherit equally (*i.e.* a forced share in a will). Such a provision, despite good intentions, could be detrimental to a family. For example, in Brazil at the death of the parents, the law mandates that land must be divided equally among sons and daughters. A will providing otherwise without the written consent of the heirs is invalid.<sup>62</sup> This provision has proven problematic because land has been divided into plots too small for subsistence farming in Southern Brazil. Another problem with this provision for equal division between sons and daughters arises from the fact that, under customary law, only one child is responsible for his parents. If, because of the equal division rule, this child does not have a future right to a reasonable share of the land owned by the parents, he is less likely to be able to care for his parents and more likely to need to go to the city to find adequate work for his family.<sup>63</sup>

#### **IV. Checklist of Potential Legal Impediments and Solutions**

Following is a list of potential impediments to women's participation in the ownership use and disposition of land in ECA countries. Following each impediment are potential solutions identified from developed market economies. The potential solutions must, of course, be viewed within the context of each country's general legal and institutional framework as well as the country's customary law. Not all solutions will be appropriate for every country.

##### **Potential Impediment: Land titles or other legal documents are issued or registered on a household basis.**

Often women who have legitimate rights to land are not named on the legal documents and therefore their legal rights are unclear.

##### **Potential Solutions**

- Include community property law in the legal framework, which would establish by law that all property acquired, not by gift or inheritance, by either spouse during marriage is "community" property.

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<sup>61</sup> CIVIL CODE OF FRANCE, art. 832.

<sup>62</sup> INEKE VAN HALSEMA, *HOUSEWIVES IN THE FIELD: POWER, CULTURE AND GENDER IN A SOUTH-BRAZILIAN VILLAGE* 100, 128 (CEDLA, 1991).

<sup>63</sup> FRANS PAPMA, *CONTESTING THE HOUSEHOLD ESTATE: SOUTHERN BRAZILIAN PEASANTS AND MODERN AGRICULTURE* 26 (CEDLA 1992).

- Require in law that all adult members of a household who hold land in common ownership be listed in the register.
- Provide in law for co-management and equal power over concurrently owned property. Each spouse can use and enjoy all property in co-ownership. One spouse alone might be provided with enhanced powers of management when the other spouse leaves, disappears, or becomes incompetent to act as a property manager.
- Enforce fair and equitable property management of co-owned property by providing that either spouse may be liable to the other for mismanagement of the property or allow recourse to the courts if either spouse jeopardizes the family's best interest in the course of property management.

**Potential Impediment: Family businesses, including family farms, may not be considered to be in co-ownership of both spouses.**

Provisions that exclude from the community property or common share property any property used by one spouse for his occupational needs may disregard the wife's contribution to the family business or farm.

#### **Potential Solution**

- Provide in law that when there is a family business or family farm, the legal presumption will be that the farm or business is held in common ownership to be divided equally upon separation.

**Potential Impediment: Members of a peasant farm are unable to leave the farm with land and property in-kind.**

Women may not be able to leave family farms with capital assets in the event of a divorce.

#### **Potential Solutions**

- Give departing members of a peasant farm the legal option of receiving their share of land and other assets in kind.
- Establish a legal rule that provides that spouses may always divide land held in common ownership regardless of minimum land size requirements.

**Potential Impediment: Division of property at the time of divorce may make it economically difficult for one or both spouses to function independently. .**

When property is divided according to whether it has been used by one spouse exclusively, women may receive less valuable property. In most countries men tend to use larger and more expensive farm machinery than women. Women who do not receive a fair share of farm property will have a difficult time maintaining their livelihood.

#### **Potential Solution**

- Establish a legal presumption that family business and family farm property will be divided so that each spouse will receive a mandatory minimum share of the total estate or of all immovable property. Permit the mandatory minimum share presumption to be overridden only with the written consent of each spouse.

**Potential Impediment: Written consent is not required for land transactions when land is held in common ownership.**

Legal rules require consent for land transactions when land is held in common ownership, but formalized written consent is not specified, weakening the effect of the requirement.

#### **Potential Solutions**

- Legally require that both spouses consent in writing for all transactions (lease, sale, mortgage) which involve land, household necessities, and other specified assets.
- Give both spouses equal legal rights to community property by requiring the signatures of both spouses to transfer or encumber community property.
- In all cases of common ownership (not only community property) require written consent by all common owners to transfer or encumber land.

**Potential Impediment: Rules regarding inheritance of land may be inadequate or conflicting.**

Lack of formal rules regarding inheritance of land may lead to an inequitable distribution of land between males and females.

#### **Potential Solutions**

- Establish by law a default inheritance provision, which provides that upon death, each spouse may pass all his or her separate property and one-half of the community property or co-owned property through a will, with the other half going to the



surviving spouse. If the spouse dies without a will, all community property or co-owned property might be transferred to the surviving spouse.

- Adopt legal inheritance rules that do not on their face require gender equality or gender preference, but rather allow individuals to choose how to distribute their property. At the same time, adopt statutory rules providing a "forced" minimum share for spouses.
- Enact legal rules for distribution of land previously owned by state or collective farms that require land to be distributed equally to all members of the state or collective farms, and if children of members also qualify for distribution, equally to all children.
- Establish a legal rule that a spouse or descendant who has been farming the land that is passed through inheritance can acquire the whole farm as against the non-farming beneficiaries, but must pay the other beneficiaries an amount equal to the value of their share of the farm.

## Chapter 13

# *Land-Related Administrative Institutions*

*by David Bledsoe*

### I. Introduction

Land-related administrative and regulatory institutions play a vital role in defining and supporting the agricultural land markets in those countries where such markets are viable, healthy, and active. Although these land-related administrative and regulatory institutions vary in organization, structure, size, locale, and scope of responsibility from country to country, they typically fill many of the same roles and provide similar services. Some of the functional areas within which such institutions provide regulation, administration, and/or services include:

- land use and planning;
- taxation;
- land registration;
- surveying and mapping;
- credit and mortgage;
- insurance; and
- agency and brokerage.

Several ECA countries have land-related administrative and regulatory institutions in place that are active to varying degrees in some of these functional areas. For example, in Russia, the Ministry of Land Policy, Construction, and Communal Services has been given broad administrative and regulatory responsibility for land use planning and monitoring, land taxation, land registration, surveying, mapping, land and landowner census, and related research.<sup>1</sup> In Moldova, a comprehensive land titling project is being implemented by local village mayors pursuant to procedures established jointly by the Ministry of Privatization and State Property Administration (recently subsumed within the Ministry of Economy and Reforms), and the National Agency for Geodesy, Cartography and Cadastre.<sup>2</sup>

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<sup>1</sup> This ministry was originally formed in part in 1992 with the creation of the Land Reform and Land Resources Committee. Decree of the President of the Russian Federation No. 346, "Statute of the Land Reform and Land Resources Committee Under the Russian Federation Government" (May 26, 1992); Decree of the President of the Russian Federation No. 483, "On the Structure of Federal Bodies of Executive Power" (April 30, 1998).

<sup>2</sup> *Provisional Instructions on Preparing Land Arrangement Projects*, December 9, 1997; *Provisional Instruction on Filling Out, Issuance and Maintenance for the Title Certificates Confirming Landholders' Rights*, December 9, 1997.

Agricultural land uses and transactions ought to happen within and in response to a sound and functional administrative and regulatory institutional framework. Such a framework should:

- rationally develop and clearly define rights and responsibilities of the various administrative actors;
- put in place suitable administrative processes and controls;
- provide mechanisms for altering the rights and controls; and
- help define and make productive the relationships between market participants (between buyer and seller or lessor and lessee, for example).

If this institutional framework fails to exist or contains defects, productive and efficient land use and land transactions are hampered or fail to happen.<sup>3</sup> As shown throughout this report and in other sources, institutional inadequacy, deformity, or absence can create impediments that interfere with or stop beneficial agricultural land transactions and uses.

For example, over-centralization of land administration hampers agricultural land use changes in Russia. Restrictive land use regulations that provide overly broad administrative discretion accompanied by harsh sanctions stifle efficient agricultural land use in Russia, Belarus, Bulgaria, Kazakhstan, Slovenia, Uzbekistan, Moldova, Ukraine, and the Kyrgyz Republic.<sup>4</sup> In Albania, a lack of communication and coordination between the five ministries collaborating in a new land registration system created confusion and duplication of efforts.<sup>5</sup> Vague rules on local government spending authority have created confusion and inefficiency in distributing tax revenues in Bulgaria, Hungary, and Poland.<sup>6</sup> In Romania and Bulgaria, limitations on local government spending discretion have deterred effective tax revenue use.<sup>7</sup>

This section describes some of the legal issues central to land-related administrative and regulatory institutions and provides options that might be suitable to help shape laws creating sound institutional frameworks.<sup>8</sup>

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<sup>3</sup> See Paul Munro-Faure, *Supporting Markets in the Agricultural Land of Transitional Economies*, in AGRICULTURAL LAND OWNERSHIP IN TRANSITIONAL ECONOMIES 82, 83-85 (Gene Wunderlich ed., 1995).

<sup>4</sup> See Chapter 6, *Land Use*.

<sup>5</sup> DAVID STANFIELD, CREATION OF LAND MARKETS IN TRANSITION COUNTRIES: IMPLICATIONS FOR THE INSTITUTIONS OF LAND ADMINISTRATION 10 (University of Wisconsin Land Tenure Center, paper prepared for the International Conference on Land Tenure and Administration, September 1996).

<sup>6</sup> See Chapter 10, *Land Taxation*.

<sup>7</sup> *Id.*

<sup>8</sup> Some observers have identified three basic categories of institutions: (a) constitutional order (fundamental rules about how society is organized); (b) institutional arrangements (laws, regulations, associations, contracts, and property rights created within the rules specified by the constitutional order); and (c) normative behavioral codes (cultural values that legitimize the arrangements and constrain behavior). The institutional arrangements are seen as

## II. Issues and Options

### A. Distribution of Institutional Responsibility

Rational distribution of responsibilities and authority across levels of land-related administrative and regulatory institutions is essential to accomplishing institutional missions. Over-centralization of functions can cause confusion, delay, and inefficiency.<sup>9</sup> While some responsibilities and powers are best left with centralized (national or regional) institutions, others are better given to local governments.<sup>10</sup> From the standpoint of both administrative efficiency and empowerment, institutions such as the European Union and the Catholic Church have urged the principle of "subsidiarity," under which functions should be carried out at the lowest administrative or operational level at which there is a clear capacity to carry out such functions.<sup>11</sup> The aim of central government bodies should be to provide the general policy and regulatory mandates from which regional and local administrative institutions can operate.

For example, national government might appropriately conclude that a viable credit and mortgage market, as a general policy, would benefit the agricultural sector. Mortgage regulations and standard mortgage forms and contracts might also appropriately be crafted at the national level. However, mortgage filing and foreclosure actions probably would be best conducted at the local level. As another example, general tax policies might best be crafted at a national or regional level, whereas tax valuations might best be administered locally. Local land use or zoning plans are also probably best crafted (and variances from them granted) at the local level, but such local plans should reflect the general policy mandates provided by the national or regional government.

Certain fundamental principles, such as private ownership including the right to buy and sell, might best be laid out at the national level. At the same time, some related, subsidiary rules (such as the maximum permissible size of agricultural land holdings) might be developed locally

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more susceptible to near-term reform than the constitutional order or the normative behavioral codes, which evolve more slowly. In countries where all three categories are evolving, some incongruities among the three types of institutions can be expected. For example (and as described elsewhere in this report), while the constitutional order may provide for private property rights, the corresponding registration and enforcement processes may be absent. Gershon Feder & David Feeny, *The Theory of Land Tenure and Property Rights*, in *THE ECONOMICS OF RURAL ORGANIZATIONS* 241 (Hoff et al. eds., 1993).

<sup>9</sup> CATHERINE FARVACQUE & PATRICK MCAUSLAN, *REFORMING URBAN LAND POLICIES AND INSTITUTIONS IN DEVELOPING COUNTRIES* (World Bank Urban Management Programme Policy Paper 91, 1992).

<sup>10</sup> See generally the discussion of distribution of governmental responsibility for the delivery of urban infrastructure in WILLIAM F. FOX, *STRATEGIC OPTIONS FOR URBAN INFRASTRUCTURE MANAGEMENT* (World Bank Urban Management Programme Policy Paper 52, 1994).

<sup>11</sup> See, e.g., Patrick Hennessy, *Hurd Calls for a New EU Treaty to Protect the Nation State*, LONDON EVENING STANDARD, June 17, 1998, at 19.

(but perhaps within a range of possible choices that has been set nationally). The aim of local government bodies and the laws defining their authority in land-related matters should be to efficiently and transparently implement the general policy framework in light of local information and characteristics.

The issue of institutional decentralization is one of moving responsibilities and authority to local levels. Decentralization can be viewed in at least two ways: (a) moving central government offices to regional or local levels ("deconcentration"), and (b) moving authority from the central government to local levels ("devolution"). Note that deconcentration can be done without moving authority to local levels from the center.<sup>12</sup>

In the context of delivering infrastructure services, one commentator saw the movement of authority from central government to local government (devolution) as being effective for delivering some services but not others. Although not strictly related to institutional regulation and support of agricultural land use and transactions, the conclusions are informative. Devolution works well when:

- economies of scale are limited;
- local input and choice is strongly desired;
- demands vary by locality;
- benefits from the institutional service delivery accrue to local residents; and
- strong local government exists.

Devolution is less effective when:

- many beneficiaries are distributed across a wide geographic area;
- demands for service are homogeneous across localities; and
- economies of scale are significant.<sup>13</sup>

When responsibility and authority are moved to local levels, there are certain requirements for success, and the degree of transfer should depend upon the context of each locality. First, local institutions need to have skills in decision-making, administration, and the appropriate functional areas. Training will be required in many cases. Rural labor markets may not attract or retain skilled workers. Second, the characteristics of other local institutions must be considered when moving responsibilities and authority to local levels. For example, moving land registration duties to the local level may be problematic if there is no local capacity to perform surveying. Central government support may be required in such cases. Third, local institutions should reflect local customs and norms such that the institutions are seen as

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<sup>12</sup> There may be a further qualification that, if deconcentration is accompanied by features such as local payment of officials' salaries or local power to hire or fire, it may in fact operate as devolution.

<sup>13</sup> Fox, *supra* note 10, at 52-53.

legitimate and fair. If local support is not secured, the costs of obtaining and enforcing compliance can be prohibitively high. Fourth, the local institutions should be reasonably free of corruption and favoritism. Finally, local institutions must be enabled to raise and retain revenue, while simultaneously being able to depend on predictable grants from central government.<sup>14</sup>

The factors weighing against devolution and the challenge of meeting the requirements for success may prompt some compromise between leaving institutional responsibility and authority in centralized hands and moving it to rural local governments. Regional institutions are one option. Cooperation and collaboration between local institutions in some functions may provide another option. The application of new technologies to deliver quality service to sparse populations is yet another.<sup>15</sup>

At any level, administrative or regulatory institutional authority ought to be accompanied by freedom from political intervention. This freedom is more likely if these institutions have secure sources of funding, if senior personnel are protected from unfair dismissal by politicians, and if senior personnel themselves are not in a position to benefit from the political process. Freedom from political intervention can be fostered if an institution's enabling legislation sets out key powers and duties and establishes financial security.<sup>16</sup>

Concentrations of authority should also be considered when distributing responsibility and authority to institutions in enabling legislation. Placing too many areas of authority within a single institution may create conflicts of interest and the prospect for abuse of power. Some combinations of functions may best be distributed to more than one institution. For example, in land use regulation, the functions of planning, regulation promulgation, permit application processing, variance rulings, inspection, and sanctioning might best be split between two or more bodies.

However, institutional fragmentation can also become an issue affecting distribution of authority and powers (particularly in evolving governments). Fragmentation occurs when discrete or closely interrelated functions are distributed across a number of institutions (either vertically or horizontally). Such fragmentation, at any level, can create confusion, inefficiency, and poor or non-existent service. Fragmentation can occur when old institutions remain in place after their functions have changed or been eliminated. As new policies and related functions are created, they may be pushed upon a collection of old institutions. Inefficiencies can result. With

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<sup>14</sup> See generally *id.*, at 52-55; Yujiro Hayami, *Strategies for the Reform of Land Property Relations, in AGRICULTURAL POLICY ANALYSIS FOR TRANSITION TO A MARKET-ORIENTED ECONOMY IN VIETNAM* 14 (Randolph Barker ed., 1994) (FAO ECONOMIC AND SOCIAL DEVELOPMENT PAPER 123); Farvacque, *supra* note 9, at 19-24, 91-93.

<sup>15</sup> William P. Brown & J. Norman Reid, *Misconceptions, Institutional Impediments, and the Problems of Rural Governments*, 14 PUBLIC ADMINISTRATION QUARTERLY 265, 274 (1990).

<sup>16</sup> NATIONAL ECONOMIC RESEARCH ASSOCIATES, GOVERNANCE AND REGULATORY REGIMES FOR PRIVATE SECTOR INFRASTRUCTURE DEVELOPMENT 21 (Asian Development Bank, 1998) [hereinafter *Governance*].

the creation of new functions should also come an evaluation of existing institutions' capacity to undertake them. If necessary, old institutions should be eliminated. If new functions are distinct from present functions, new institutions may be created to operate alongside old institutions. In other cases, fragmented institutions should be combined.

## **B. Institutional Transparency**

Land-related and other administrative institutions should be transparent. That is, the structure, functions, controlling regulations, and the related input data should be easy to see and understand. Actions taken by institutions must be public, open, accountable, and subject to appeal. Transparency permits users and customers of land-related administrative institutions and those regulated by institutions to make rational and efficient decisions. Transparency also helps to promote participation by regulated users, customers, and constituents because they will have a better understanding of the factors that drive institutional decisions.<sup>17</sup>

Structural transparency means that the institutional composition and organization is clear. Hierarchy, named functions, locations, means of access, position descriptions, and the names of personnel should be published and available. Facilities and offices should be open to the public. Tours and open houses should be held periodically. Functional transparency requires that what the institution does, is responsible for, and can make decisions about are clear and available at the grassroots. The public must understand or be able to readily learn the scope of institutional responsibility. Reassessment and periodic updating are essential. Transparency of regulations means that applicable legislation, charters, codes, laws, and interpretive decisions are publicly available. Those who must make rational decisions in light of these materials must know they exist. Suitable summaries, checklists, guides, forms, and directories should be available. Institutional staff should be trained and available to locate and interpret obscure regulations. Transparent input and operating data mean that the information collected, processed, and acted upon by the institution (tax base and valuation data or land registration records, for example) is accessible and easy to understand by citizens who need to make decisions in light of it. Incomplete, outdated, or poorly organized input data creates uncertainty and risk for both the institution and citizen-users.

## **C. Institutional Product**

Institutional product includes the processes, regulations, and decisions that both make up and flow from institutions. Institutional product should be of high quality, reliable, and prepared as quickly and inexpensively as possible. A number of institutional sub-issues fall within this category.

The functional processes created and undertaken by land-related administrative institutions must be clearly and rationally defined. Process definition should clearly reflect the institution's mandate that has been established by law or regulation at higher levels of

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<sup>17</sup> Munro-Faure, *supra* note 3, at 93-94; *Id.* at 21-22.

government. Processes should reflect local characteristics and needs as well. Failure to define processes (and to identify the tasks that make them up) leads to inconsistency, arbitrary actions, and duplication of effort. Institutional processes at any level should match fiscal realities and resources. The administrative and financial replicability of processes (for example, methods of land surveying used for title documents) over the whole universe to be served must be a central consideration.<sup>18</sup> In terms of vertical and horizontal assignments within and among institutions, the locations where processes and tasks will be performed must be defined as well. Formal and routine communication is essential when portions of processes are assigned across departments or shared by institutions. Computerization and e-mail cannot, of course, be assumed for many ECA countries; fax and even telephone communications may also, in some cases, be difficult. Regular reassessment and redefinition of processes should be a part of each institution's charter.

Promulgation of regulations and administrative rule-making should be done transparently and produce clear and principled product. The level at which the regulations are crafted should inform the detail and content of the regulations. Nationally or regionally promulgated regulations should have sufficient specificity so as not to be over-broad, but such regulations should not be overly restrictive or prevent local adaptation on subjects where local adaptation is appropriate. Outdated and inappropriate national legislation should be abandoned and replaced. Transparency requires that national policies be honestly crafted, clearly defined, and not subject to regulatory subversion or capture. Local rule-making should reflect national policy while embracing local characteristics and needs. Local flexibility must be balanced against the danger of local caprice and arbitrariness within each ECA country setting, and with an eye to the capability, extent of corruption, and degree of ideological bias likely to be present in the local administrative apparatus. Speedy and dispositive appeal processes should be provided at all institutional levels. Neither national, regional, nor local regulations should impose high costs of compliance or high transaction costs on those regulated. No institution should be populated solely by personnel that remain from periods during which drastically different goals or policies were being implemented. New policies and directions may necessitate new leaders and staff. At a minimum, controlling bodies of institutions should be broadened to include representation that favors the new policies and directions.

Quality, efficiency, and cost-effectiveness of institutions and their products can be prompted in several ways. First, incentive-based approaches to personnel management can be used to reward productivity, cost consciousness, innovation, and effective service. Failures should be penalized.<sup>19</sup> Objective performance measures are central to incentive-based management, and institutional processes and services should be crafted so that such measures are a byproduct. Second, privatization of institutional functions should be considered. Privatization of functions should be viewed as a continuum of options running from purely private service

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<sup>18</sup> See ROY L. PROSTERMAN AND JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT*, Ch. 7 (1987).

<sup>19</sup> Farvacque & McAuslan, *supra* note 9, at 92.



provision to a variety of public/private partnerships. When evaluating the functions of public institutions for possible privatization a number of criteria are pertinent:

1. Competitive market pressures must exist in the area to be considered for privatization. For example, if surveying or computer system support were to be considered for privatization, contestable markets (markets where potential entrants restrain the price-setting behavior of current private producers) in surveying and computer support must exist or be created.
2. Privatization works best for services that are already delivered in the private sector.
3. Services that have easily observable output and that can be easily monitored are best suited to privatization.
4. Services that may be subject to operational efficiencies are better candidates for privatization.<sup>20</sup>

Finally, the quality and effectiveness of institutional product can be promoted by establishing monitoring mechanisms or bodies to meaningfully participate in and review institutional operations and effectiveness. These bodies can include members from government, the grassroots, and private enterprise. This monitoring function should be formal and routine and include ways for recommendations to become institutional practice.<sup>21</sup>

#### **D. Fee-For-Service Institutional Funding**

The majority of funding for land-related administrative and regulatory institutions typically comes through tax revenue subsidies. However, some services provided by such institutions might appropriately be paid for (at least in part) by the users. Land title registration and recording services are examples. Most developed countries have instituted a relatively low registration fee that partially or fully covers the overhead costs associated with land registration. A caveat here is that when public policy requires motivating persons to use the service (such as land registration) to ensure broad coverage, the level of fee should not discourage use.<sup>22</sup> Balancing is required. Access for the lowest income service users can be ensured by targeting subsidies toward those service costs. In any case, payment of fees should be clearly linked to receipt of services. Service enhancements can be accompanied by appropriate fee increases. Imposing service fees can be politically difficult initially in areas where services have been under-priced or fully subsidized. Yet failure to price services can create problems if revenue shortfalls lead to dissatisfied users and slower economic growth.<sup>23</sup> Other candidate services for user fees might be surveying, mapping, development permit processing, and zoning variance requests.

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<sup>20</sup> Fox, *supra* note 10, at 58-64.

<sup>21</sup> Farvacque & McAuslan, *supra* note 9, at 92-93; GOVERNANCE, *supra* note 16, at 21.

<sup>22</sup> See Chapter 9, *Land Registration*.

<sup>23</sup> Fox, *supra* note 10, at 73.

## **E. Administrative Land Dispute Resolution**

One way for ECA countries to streamline land dispute resolution is to establish an initial administrative level of review. The potential danger with administrative dispute resolution, however, is the vesting of both executive and judicial authority with one single branch of government or, in many cases, with one single government agency such as the land committee. An administrative system for land dispute resolution should balance expediency and fairness. It should incorporate many of the safeguards relevant to judicial dispute resolution (discussed in **Chapter 14, *Land-Related Judicial Institutions***), as well as the characteristics of effective administrative institutions in general, discussed in the section immediately following. Particularly important to protecting individual rights in administrative dispute resolution are: (a) strictly-enforced time limits governing initiation of claims, compilation and presentation of evidence, and adjudication; (b) guaranteed right of prompt appeal to a judicial institution; (c) transparent procedural rules; (d) increased accessibility through the use of easily-understood standardized forms and minimal costs to initiate claims.

## **III. Checklist For Effective Administrative Institutions**

This section briefly describes some of the characteristics that ought likely exist within sound and functional land-related administrative institutions. This checklist is not exhaustive, and the items shown below are not uniform requirements for every country setting. Each institution should reflect the particular setting and pertinent ancillary issues.

### **Mission**

- Is clearly defined in current and well-crafted enabling legislation
- Matches fiscal realities
- Is periodically reviewed

### **Organization**

- Rationally reflects mission, responsibilities, and authority
- Is clearly defined
- Is made public
- Strikes appropriate balance between centralization and devolution
- Avoids over-centralization
- Avoids fragmentation
- Has formal communications procedures
- Is periodically reviewed
- Solicits and uses public input

## **Processes and Responsibilities**

- Are clear, understandable, and accessible (transparent)
- Rationally reflect mandate
- Are replicable
- Are made public
- Are appropriately distributed horizontally and vertically
- Reflect the level to which they are distributed (local versus national)
- Reflect public input
- Are privatized or subject to public/private partnership when appropriate
- Are periodically reviewed and updated

## **Authority**

- Is real and free from political intervention
- Is subject to quick and dispositive appeal
- Is flexible
- Is not overly concentrated

## **Funding**

- Is secure
- Is obtained through appropriate national grants
- Is obtained through appropriate local taxation
- Can be supplemented through user fees

## **Staff**

- Is trained
- Is free of corruption and favoritism
- Is not hostile to the functions being performed
- Reflects incentive-based management

## Chapter 14

# Land-Related Judicial Institutions

by Brian Schwarzwald

### I. Introduction

The development of equitable and efficient judicial institutions for resolving land-related disputes is essential to the smooth functioning of a land market. The lack of effective judicial institutions can impede the development of land markets in two important ways. First, property rights in land are meaningless if they cannot be enforced. Second, even where property rights are well-defined and secure, transactions involving those rights will be less frequent where mechanisms for resolving contract disputes are ineffective.

For ECA countries, the development of equitable and effective land-related judicial institutions depends on broader judicial system reforms. These important reforms, including the recruitment and training of qualified judges, standardization of court rules and procedures, and strong anti-corruption measures, will require significant investments of time and money on the part of ECA country governments. Due to the current lack of functioning judicial institutions in many ECA countries, some commentators have suggested that the development of private mechanisms for enforcement of public laws provides the best hope for the development of effective legal systems in ECA countries for the short and medium term.<sup>1</sup>

While private enforcement mechanisms, such as arbitration, may effectively complement the judicial system in ECA countries, they should not be considered a replacement for well-functioning judicial institutions for several important reasons. First, in the absence of a well-functioning judicial system, private enforcement mechanisms may be so expensive that they become inaccessible. This is especially important in the case of land disputes, where accessibility and affordability are essential to farmers' willingness and ability to seek redress. Second, private enforcement mechanisms may be more effective in deciding individual cases, but due to the absence of state endorsement and public announcement of decisions, private enforcement mechanisms cannot develop the uniform body of case law that is necessary for individuals to develop confidence in their legal rights. Third, even private enforcement mechanisms depend on well-functioning judicial institutions for enforcement of decisions when parties fail to voluntarily comply. Therefore, the lack of effective judicial institutions can hinder the effectiveness of private enforcement mechanisms.

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<sup>1</sup> See Jonathan R. Hay & Andrei Schleifer, *Private Enforcement of Public Laws: A Theory of Legal Reform*, 88 AMERICAN ECONOMIC REVIEW 398-403 (1998).

Rather than analyzing existing judicial institutions and private enforcement mechanisms in ECA countries, this chapter instead offers an examination of three divergent approaches to land-related judicial institutions, adopted by developed and developing countries, as possible models for ECA countries. These approaches include: (a) resolving land disputes through courts of general jurisdiction; (b) the establishment of land courts or tribunals with jurisdiction over one or several types of land disputes, with remaining land disputes handled by courts of general jurisdiction; and (c) the establishment of land courts or land tribunals with broad jurisdiction over all or nearly all land disputes. The chapter analyzes the common characteristics of specialized land courts in a variety of jurisdictions, providing a detailed discussion of the Hong Kong Lands Tribunal and the New South Wales Land and Environmental Court, and concludes with a checklist for the establishment of equitable and efficient land-related judicial institutions in ECA countries.<sup>2</sup>

## **II. Comparative Approaches to Land-Related Judicial Institutions**

Most countries resolve disputes concerning land in courts of general jurisdiction. In the United States, for example, land disputes are typically heard by state courts (usually organized by county) whose jurisdiction is unlimited by subject matter or the monetary value of the dispute. In some special circumstances, as where the interpretation of federal law is required, land disputes may be heard by a parallel system of federal trial courts known as Federal District Courts, whose territorial jurisdiction usually encompasses several counties within a state, and sometimes can cover an entire state where the population is small. Proceedings in state and federal courts are governed, respectively, by state or federal rules of civil procedure.

Numerous other countries also resolve land-related disputes in their courts of general jurisdiction. Of the developed countries primarily analyzed in this report, both Italy and Japan also adopt this approach.<sup>3</sup>

Mainly for efficiency reasons, however, several countries and territories have adopted specialized judicial institutions, typically called land courts or land tribunals, to resolve land disputes. Land courts and land tribunals in a variety of jurisdictions share the following common characteristics.<sup>4</sup>

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<sup>2</sup> For a discussion of a series of general institutional issues, such as funding, staffing, and freedom from political intervention, see Chapter 13, *Land-Related Administrative Institutions*.

<sup>3</sup> See Danilo Agostini, *Rural Land Law in Italy* (May 1998) (unpublished manuscript on file with Rural Development Institute); see also Isoshi Kajii, *Rural Land Law in Japan* (May 1998) (unpublished manuscript on file with Rural Development Institute).

<sup>4</sup> JENNIFER DUNCAN, *LAND COURTS* (April 13, 1995) (unpublished memorandum on file with Rural Development Institute).

First, in most of the countries that use land courts or land tribunals, the government established them to address recurring problems stemming from handling technical land claims in the general courts. Land courts reflect an attempt to ensure judicial expertise on land issues, thereby promoting conformity in decisions that in turn allows for reasonable expectations for future claimants. Land courts may also reflect an attempt to streamline the judicial process for land claims in response to increasing backlogs in the general courts.

Second, land courts are judicial rather than administrative in nature. The courts do not function as administrative bodies whose decisions are reviewable by a court. Instead, they operate in place of general district or appellate courts in determining land claims. Judgments of these courts are binding, although parties retain the right to appeal to a higher court (at least on questions of law).

Third, land courts have jurisdiction that encompasses questions of fact, law, and compensation.

The main differences among land courts and land tribunals consist of jurisdictional and procedural variations based on local circumstances. In some countries, land courts have jurisdiction only over very specific issues. In France, for example, an agricultural land-tenure trial court has been empowered to resolve disputes related to land conversion from agricultural to non-agricultural uses and claims on land that has been left fallow.<sup>5</sup> The Netherlands has established Tenancy Tribunals at both the cantonal and Court of Appeals levels, whose jurisdiction is limited to cases involving non-renewal of agricultural land lease contracts.<sup>6</sup>

In Norway, a Land Consolidation Court has been established solely to implement the provisions of the Land Consolidation Act. The Court consists of the Land Consolidation Judge (a professional surveyor) and two lay persons (plus a small technical staff). Decisions rendered by the Court are treated with the authority of courts of general jurisdiction rather than as decisions of an administrative body, elected board of involved landowners, or politically elected authority. The Court is required to consult with other public planning authorities when its decisions are likely to affect matters under their jurisdiction.<sup>7</sup>

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<sup>5</sup> Louis Lorvellec, *Agrarian Land Law in France*, in *AGRARIAN LAND LAW IN THE WESTERN WORLD* 57 (Margaret Russo Grossman and Wim Brussaard eds., 1992)[hereinafter *Agrarian Land Law*].

<sup>6</sup> Wim Brussaard, *Agrarian Land Law in the Netherlands*, in *Agrarian Land Law*, *supra* note 5, at 128. In the Netherlands, the legal duration of an agricultural lease contract is 12 years for a farm and 6 years for land without farm buildings. Lease contracts concluded for the normal duration are automatically continued for a period of 6 years, unless one of the parties informs the other party, within a certain period of time before the termination of the contract, that he or she does not want to prolong the contract. The lessee has the right to contest such a non-renewal notice before the Tenancy Tribunal. The Tenancy Tribunal decides such cases in accordance with the principles of equity, provided that the Agricultural Lease Act does not treat the lease under some special category. *Id.*

<sup>7</sup> Torgeir Austenå, *Agrarian Land Law in Norway*, in *Agrarian Land Law*, *supra* note 5, at 40.

In other countries and territories, however, land courts have been given much wider jurisdiction. The Hong Kong Lands Tribunal and the New South Wales Land and Environmental Court in Australia are two examples of land courts with wide jurisdiction over land-related disputes. Both were designed to increase the efficiency and expertise required in resolving land-related disputes.

### 1. The Hong Kong Lands Tribunal

The Hong Kong Lands Tribunal has jurisdiction over disputes covering both agricultural and non-agricultural land under several circumstances. The Tribunal has both original and appellate jurisdiction over any claim to determine the amount of compensation owed by the government, if brought under an ordinance listed in a schedule appended to the Lands Tribunal Ordinance. These listed ordinances include: (a) the Landlord and Tenant Ordinance; (b) the Land Acquisition Ordinance; (c) the Air and Water Pollution Ordinances; and (d) ordinances providing for government takings of land for public works such as roads, railways, and parks.<sup>8</sup>

The Hong Kong Lands Tribunal also has jurisdiction over claims to determine the amount of compensation owed by the government related to a government land taking if brought under an ordinance not listed in the schedule.<sup>9</sup>

Moreover, the Tribunal has jurisdiction to make orders for possession, eviction, and payment of rent under the Landlord and Tenant Ordinance and has original or appellate jurisdiction whenever vested in it by another ordinance. In the exercise of its jurisdiction, the Tribunal has the same jurisdiction to grant remedies and relief, both equitable and legal, as the High Court of Justice.<sup>10</sup>

The Lands Tribunal consists of: (a) a president, who is one of the judges of the Supreme Court and is appointed by the Chief Executive; (b) presiding officers, who include all district judges and deputy district judges; and (c) other members appointed by the Governor who are qualified in law (qualified for appointment as a district judge), land valuation, or some other subject relevant to the proceedings.<sup>11</sup>

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<sup>8</sup> Hong Kong's Lands Tribunal Ordinance, 1974, sec. 8(1) [hereinafter Lands Tribunal Ordinance].

<sup>9</sup> Such claims must meet two conditions. First, the claim must arise from governmental action concerning: (a) compulsory acquisition of land rights; (b) extinguishment or variation of land rights; (c) creation of easements; or (d) authorization of any undertaking affecting land or any interest therein. Second, the claim must be submitted to the Tribunal for determination by agreement by or on behalf of both the Government and the claimant. *Id.* sec. 8(2).

<sup>10</sup> In Hong Kong, the "Supreme Court of Judicature" consists of both the High Court of Justice (High Court) and the Court of Appeal. The Supreme Court is a court of unlimited civil and criminal jurisdiction, applying both common law and equity. The High Court has mostly original jurisdiction, while the Court of Appeal has an almost entirely appellate jurisdiction. PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 62,63 (1987).

<sup>11</sup> Lands Tribunal Ordinance, *supra* note 8, sec. 4.

The Tribunal operates in sittings of one or more judges. The President selects which member or members will hear the case and, when more than one member is selected, designates a presiding officer for the hearing.<sup>12</sup> Any differences in opinion among members of the Tribunal are decided by majority vote, and, in the case of a tie, the presiding officer carries the deciding vote<sup>13</sup>.

A member of the Tribunal may appoint any expert who has specialized knowledge or experience in a particular subject to assist the member in the proceedings before it, but the decision of the Tribunal member, and not the expert, is official.<sup>14</sup> The Tribunal must advise the parties of the nature of the advice given by experts in any hearing, and must give parties the opportunity to contest the advice before the Tribunal renders its decision.<sup>15</sup>

The Tribunal's primary goal is to maximize efficiency. Section 5(a) of the Lands Tribunal Ordinance states, "[p]roceedings of the Tribunal shall be conducted with as much informality as is consistent with attaining justice and, for this purpose, the President may give directions as to the manner and form in which proceedings shall be conducted."<sup>16</sup>

Thus, elaborate, expensive, and time-consuming rules and procedures as to pleadings, evidence, and the mode of conducting hearings, all of which would normally apply in the general court system, need not be applied in the Lands Tribunal. In this sense, Lands Tribunal proceedings may acquire some of the advantages of speed and informality commonly associated with arbitration proceedings.<sup>17</sup>

The Tribunal has power to determine most procedural matters, including: (a) policies regarding witnesses; (b) hearing of any matter; (c) punishment for contempt; (d) order of inspection of any premise; (e) enforcement of its decisions and orders; (f) default orders; and (g) the process of discovery of facts.

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<sup>12</sup> LAWS OF HONG KONG [hereinafter LHK], sec. 17:9(1).

<sup>13</sup> *Id.* sec. 17:9 (1A).

<sup>14</sup> *Id.* sec. 17:9 (5).

<sup>15</sup> *Id.* sec. 17:9 (4)(b).

<sup>16</sup> Lands Tribunal Ordinance, *supra* note 8, sec. 5(a).

<sup>17</sup> See generally STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES 199-239 (1992). In arbitration proceedings, elaborate rules as to testimony of witnesses, for example, relating to matters such as "hearsay," "leading questions," "yes/no answers," and "qualification of experts," can be disposed with, greatly expediting proceedings and reducing the need for representation by highly experienced legal counsel.



Decisions of the Tribunal are final. A party has two limited options for review. First, a party may appeal to the general Court of Appeal, which is not a specialized land court, on a point of law. Second, the Tribunal may, within one month of its decision, decide to review its decision on any grounds it deems sufficient. The Tribunal may initiate this internal review upon application of one of the parties or on its own motion.<sup>18</sup> If the Tribunal undertakes such a review, it may set aside, reverse, vary, or confirm its decision.<sup>19</sup>

## 2. The New South Wales Land and Environmental Court

In Australia, the New South Wales Land and Environmental Court also has broad jurisdiction over land disputes. The Court was established in 1979 to increase uniformity and efficiency of judicial proceedings regarding land. Prior to creation of the Court, land issues were dealt with in a variety of forums including the Land and Valuation Court and the Local Government Appeals Tribunal.<sup>20</sup>

The Land and Environmental Court has equal status with the New South Wales Supreme Court.<sup>21</sup> Jurisdiction includes both original and appellate jurisdiction over disputes arising between private parties and jurisdiction over appeals by citizens of state administrative actions affecting land rights. The Court has exclusive jurisdiction over several defined classes of cases: (a) environmental planning and protection appeals; (b) local government appeals; (c) land tenure, valuation, rating, and compensation; (d) civil enforcement of environmental planning and protection laws; and (e) summary criminal enforcement for environmental violations.<sup>22</sup>

The Court categorizes all business into five divisions -- one for each jurisdictional class.<sup>23</sup> All environmental planning and protection appeals cases, for example, are assigned to the environmental planning and protection appeals division. Cases can be transferred between divisions upon motion from a party or court order.<sup>24</sup>

The Court's civil jurisdiction allows it to: (a) hear and dispose of proceedings; (b) enforce any right, obligation, or duty established by a planning or environmental law; and (c) issue

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<sup>18</sup> LHK, *supra* note 12, 17:11A (2).

<sup>19</sup> *Id.* 17:11A (1).

<sup>20</sup> JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW 254-55 (1982).

<sup>21</sup> This status is qualified by the right to appeal from decisions of the Land and Environmental Court to the Supreme Court on questions of law.

<sup>22</sup> New South Wales Land and Environmental Court Act, 1979, pt. IV, div. 1 (Australia).

<sup>23</sup> *Id.* pt. IV, div. 1, secs. 26-28.

<sup>24</sup> *Id.* sec. 31.

declaratory judgments regarding any such right, obligation, or duty.<sup>25</sup> In cases involving compulsory acquisition of land, the Court has exclusive jurisdiction to assess liability and to award compensation.<sup>26</sup>

The Court is composed of judges and assessors, appointed by the Governor based on specific qualifications. Land and Environmental Court judges hold legal status equal to that of Supreme Court justices.<sup>27</sup> The alternative qualifications for judges include membership on the New South Wales Supreme Court, practice of five years or more as a barrister, or practice of seven years or more as a solicitor.<sup>28</sup> Qualifications for assessors include knowledge and experience in town planning, land valuation, natural resource management, or environmental planning.<sup>29</sup> Civil cases not involving enforcement may be heard by a single judge, by a judge sitting with one or more assessors, or by one or more assessors sitting without a judge. Civil and criminal cases involving enforcement are heard by one judge without an assessor. The Chief Judge, appointed by the Governor, determines when and where the Court sits and which judges and assessors will hear each particular case. More than one sitting can occur simultaneously.<sup>30</sup>

For all cases other than enforcement cases, an assessor presides over a pre-trial conference between parties. The goal of this conference is dispute-resolution without trial. If the parties reach an agreement, the assessor disposes of the proceedings in a summary decision. If the parties fail to reach an agreement, either: (a) the assessor sends the case to court with a summary of the issue; or (b) the parties choose not to pursue further legal action. Information disclosed at the pre-trial conference is not admissible as evidence in the trial itself. Should the case go to court, the assessor who presided at the pre-trial conference is disqualified from further participation in the case.<sup>31</sup>

The assessors serve three roles in addition to facilitating settlements. First, the Court may direct an assessor to make an inquiry into any issue regarding a case during the course of proceedings.<sup>32</sup> This allows the Court to continue hearing the case while the assessor researches a

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<sup>25</sup> Crawford, *supra* note 20, at 256. A declaratory judgment is a binding decision regarding the rights and status of a party issued by the court without awarding relief, usually before an actual controversy has arisen between parties, but in anticipation of the likelihood of such a controversy if the rules are not laid down in advance.

<sup>26</sup> New South Wales Land and Environmental Court Act, *supra* note 22, sec. 25.

<sup>27</sup> *Id.* sec. 9.

<sup>28</sup> *Id.* sec. 8. The "barrister"/"solicitor" distinction does not exist, so far as we are aware, in any of the ECA countries. In Australia (as in England) a barrister represents clients before the courts, while a solicitor provides general legal advice and may also deal with contentious matters prior to the stage of actual court litigation.

<sup>29</sup> *Id.* sec. 12.

<sup>30</sup> *Id.* sec. 29.

<sup>31</sup> *Id.* sec. 34.

<sup>32</sup> *Id.* sec. 35.

specific issue. Second, the Chief Justice may determine that any non-enforcement proceeding will be heard by one or more assessor without a presiding judge. Where two or more assessors hear a case, decisions are determined by majority rule or, in the case of a tie, the senior assessor's swing vote. Assessors can refer questions of law to the Chief Justice at any point in the proceedings.<sup>33</sup> Third, the Court may request that assessors assist in any non-enforcement case by sitting with the Court.<sup>34</sup>

Procedure differs depending on whether a case involves the Court's civil non-enforcement jurisdiction or civil and criminal enforcement jurisdiction. For cases arising under civil non-enforcement jurisdiction, flexibility and informality are key. According to Section 38 of the Act, "Class 1, 2, and 3 proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act . . . and as the proper consideration of the matters before the Court permit."<sup>35</sup> For example, parties in Class 1, 2, and 3 cases may be represented by agents who are not lawyers, are not bound by the rules of evidence, and may appeal to the Supreme Court only on questions of law.<sup>36</sup>

The Court has the authority to order the appearance or apprehension of a defendant alleged to have committed a criminal violation of environmental law.<sup>37</sup> Upon apprehension, the Court determines to either: (a) commit the defendant to prison until the hearing; or (b) release the defendant on bail. The Court also has authority to order payment of costs in criminal cases to the prosecutor or defendant and to enforce payment of all fines.<sup>38</sup> The Criminal Appeals Act of 1912 governs the right to appeal from the decision of the Land and Environmental Court in a summary enforcement, or "Class 5" case.<sup>39</sup>

As to all of these five types of cases, the Court, when comprised of the Chief Justice and at least two other justices, has the authority to make rules regarding: (a) procedure; (b) joinder and consolidation; (c) means of enforcement; and (d) any other aspect necessary to the workings of the Court.<sup>40</sup> Rules take effect upon publication but must be presented to the Parliament of New South Wales for review within 14 days of publication, where they can be disallowed.<sup>41</sup>

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<sup>33</sup> *Id.* sec. 36.

<sup>34</sup> *Id.* sec. 38.

<sup>35</sup> *Id.*

<sup>36</sup> The reference to Class is to the five numbered classes of cases described at the beginning of this subsection. Under civil enforcement jurisdiction (Class 4 cases), the petitioner is allowed to appeal questions of both fact and law. *Id.* sec. 58.

<sup>37</sup> *Id.* sec. 41.

<sup>38</sup> *Id.* secs. 52, 53.

<sup>39</sup> *Id.* sec. 74.

<sup>40</sup> *Id.* sec. 74.

The unique structure of the New South Wales Land and Environmental Court has sparked much debate in the Australian legal community. The advantages of the Court's structure are increased consistency in land decisions, increased efficiency in court proceedings, and increased expertise through the use of experts and the growing knowledge base of the adjudicators. The primary disadvantage is a lack of flexibility in handling workloads. Because the Court can only process one type of claim (those relating to land) demand for the Court's services is prone to vary widely over time.<sup>42</sup>

### **III. A Checklist for the Establishment of Effective Land Dispute Resolution Systems in ECA Countries**

The development of effective land dispute resolution systems in ECA countries is dependent on related substantive, institutional, and procedural reforms. The bodies of property and contract law in ECA countries must be improved to specifically define the rights of individuals to own, possess, and use land, as must the rules governing land-related transactions. Many of the initial laws drafted by ECA countries merely provide general frameworks. More detailed laws and regulations will often be required to provide guidance to judicial institutions.

Judicial institutions involved in the resolution of land disputes must also be improved. A threshold question is whether a particular ECA country should consider the establishment of courts or tribunals with specialized jurisdiction over land disputes. The answer to this question depends on a number of different variables, including:

- the overall level of competence and freedom from corruption of the current dispute resolution system;
- whether it would be possible from a substantive and training standpoint to have courts with specialized knowledge of land issues, and whether the personnel (and funding) for such courts can be found or trained;
- whether there are or are expected to be a sufficient number of land-related disputes to keep such a specialized court occupied;
- whether procedural requirements or ideological biases exist within the present judicial system that make the formation of a new specialized court with new personnel to consider land issues, at least the more controversial kinds of land issues (land sales, breakaways from collective farms, etc.), highly desirable;

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<sup>41</sup> *Id.* sec. 75.

<sup>42</sup> CRAWFORD, *supra* note 20, at 255.

- whether the formation of specialized land courts would be a difficult legal reform, perhaps even requiring a Constitutional amendment; and
- whether there may be alternative means of achieving the goal of expeditious, equitable, and expert resolution of land disputes, as by designating some judges in the present court system to be preferentially assigned to land cases when such cases arise, providing additional training for judges, or budgeting for experts to assist the court.

Regardless of whether specialized land courts are established, judicial institutions in ECA countries will continue to face challenges in the areas of specialized training, resources, and relative inexperience with the legal issues common in private market economies. Improving the land dispute resolution system should be considered an important component of a much broader program to improve judicial institutions in ECA countries. As noted above, a significant portion of the material dealing with land-related administrative institutions in ECA countries in **Chapter 13** is also relevant to the latter issue.

A related approach to improve the accessibility and fairness of land-related dispute resolution is to assist private citizens in accessing the legal system and directly asserting their legal rights. Such support could be provided through rural legal aid centers that provide legal information and advice regarding land-related disputes. The Rural Development Institute's experience with legal aid centers in Russia indicates that the availability of such services plays an important role not only in advising individuals as to their land rights and bringing appropriate cases before the courts, but also in providing broader public information and in educating local officials with respect to private land rights.

In mid-1996 in Vladimir *Oblast*, the Rural Development Institute established the Center for Land Reform Support, a legal aid center designed to provide advice and support to Russian peasant farmers and peasant land share owners seeking to exercise their rights to land. The Center is staffed by three Russian attorneys, all of whom are from Vladimir *Oblast*. The services offered by the Center include the publication of land rights through mass media and written materials, public meetings held in villages, free assistance to individual clients on land issues, and legal advice to *rayon* land committees. The Center provided assistance to approximately 200 individual clients on a wide range of land issues in its first two years of operation. A second Center for Land Reform Support established by the Rural Development Institute in Samara *Oblast* in February 1998 has provided assistance to 70 clients in its first five months of operation. This Center is also staffed by three Russian attorneys, all from Samara *Oblast*.

While it is difficult to make broad conclusions about the impact of the centers' activities on enforcement of land law as a whole, it is possible to state that the centers' work on behalf of their particular clients has been effective. For example, the centers have brought 15 cases directly to the courts for adjudication and have at least partially prevailed in nine cases with four cases remaining pending. Also, several clients have recounted that, but for the centers' help, they would not have been successful in pursuing their claims. Moreover, many *rayon* land committees, which play a large role in interpreting and enforcing land rights, rely heavily on

advice from the centers, particularly in Vladimir Oblast. Finally, on more than one occasion rayon administration officials have stated that the centers are “interfering” with the close relationship between the administration and the former collective and state farms. These statements validate the centers’ activities, since such close relationships are often an anathema to transparency and free markets.

Effective legal aid centers in ECA countries can be established and operated fairly inexpensively.<sup>43</sup> The following guidelines should apply to all legal aid centers:

- services should include the provision of advice and representation to individuals or groups of individuals in the exercise of their land rights or the adjudication of disputes regarding their land rights;
- the center should be operated independently from any government agency and should be staffed by local attorneys;
- attorneys should regularly travel to rural areas to disseminate information regarding land rights to farmers and local officials, meet with potential clients, and represent clients in negotiation or adjudication proceedings;
- all services should be provided to farmers free of charge.

It should be noted that most, but probably not all, ECA countries have an adequate pool of lawyers upon which to draw in establishing such centers.<sup>44</sup>

Finally, procedural rules must be improved to provide a higher degree of protection to land right holders. First and foremost, procedural reforms should ensure the accessibility of land-related judicial institutions. Simple standardized forms should be drafted and provided to farmers as a means of initiating a claim. The provisions of low cost or *pro bono* legal services, through court-related or independent means, also promotes accessibility.

Procedural reforms should also attempt to make litigation speedy and cost-effective. Time limits governing the initiation of claims, compilation and presentation of evidence, and adjudication should be established and followed. Rules as to pleadings, evidence, and the mode of conducting hearings should be simplified and streamlined, while balancing the need for full and fair adjudication. Costs for initiating a claim and acquiring legal services (see the discussion of legal aid above) should be minimized.

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<sup>43</sup> The legal aid centers have been financed with resources from United States foreign assistance programs and private foundations. Efforts are underway to make the legal aid centers self-sustaining.

<sup>44</sup> The process of interviewing and selection of lawyers to staff such legal aid centers is, in the Rural Development Institute’s experience, of absolutely critical importance.

To promote fairness and foster confidence in judicial institutions, all procedures should be transparent, and procedural rules should specify the penalties imposed on judicial officers who violate procedural requirements. Enforceability is another key element. Lack of enforcement of judgments will undermine confidence in the judicial system and discourage farmers from pursuing claims in court.

## Appendix A

### *Summary Checklist of Potential Impediments and Solutions*

The following checklist is a summary of the potential legal impediments for establishing effective rural land relations in ECA countries and of the corresponding potential legal solutions for those impediments. The checklist is organized by topics corresponding to the following chapters of this report: **Chapter 2, *Land Ownership*; Chapter 3, *Land Privatization*; Chapter 4, *Land Restitution*; Chapter 5, *Farm Restructuring*; Chapter 6, *Land Use Regulation*; Chapter 7, *Land Transactions*; Chapter 8, *Mortgage*; Chapter 9, *Land Registration*; Chapter 10, *Land Taxation*; Chapter 11, *Compulsory Acquisition*; and Chapter 12, *Women and Land*.** These chapters contain more detailed discussions of all impediments and solutions included in this summary checklist.



## ***Land Ownership***

**Potential Impediment: Private ownership of land is prohibited.**

### **Potential Solutions**

- Allow for private ownership of agricultural land in the constitution and land legislation. Provide in law for secure land tenure; the right to sell land for a negotiated price; and the right to lease, mortgage, and pass by gift and inheritance.
- Allow for long-term use rights of government-owned or communally-owned land with secure land tenure and rights to transfer and mortgage. The specific rights embodied by these use rights should parallel the rights normally associated with private ownership to the greatest extent possible.
- If support for prohibition of private ownership centers on real or perceived dangers of foreign ownership of agricultural land, place appropriate restrictions or even prohibitions on foreign ownership.
- Provide for clear legal rules governing the ownership of subsoil rights. If the state retains subsoil rights to privatized land, the law should specify the kind of compensation to be paid to the private landowner if the state or a third party exploits subsoil rights in such a way as to interfere with use of the surface.

**Potential Impediment: Enterprises are prohibited from owning land.**

### **Potential Solutions**

- Set maximum land sizes for enterprise land ownership based on the number of individual members in the enterprise, but do not allow individual members to hold more than a defined share.
- Allow unrestricted ownership of agricultural land by enterprises.

**Potential Impediment: Enterprises that have the right to own land may coerce members to contribute land to the charter capital of the enterprise.**

### **Potential Solutions**

- Forbid irrevocable capital contributions of land while allowing short-term contributions such as lease rights.

- Institute a 2-3 year moratorium on irrevocable capital contributions of land after land shares have been issued.
- Allow irrevocable capital contributions of land with safeguards. These safeguards could include allowing bilateral but not multilateral transactions, a warning on the standard contribution contract, and a requirement that the contract be notarized.

**Potential Impediment: General common ownership rules may be misapplied to land shares held in common ownership.**

#### **Potential Solution**

- Provide alternative rules for land share owners in the Civil Code or land legislation specifying that individual land share holders have the right to sell, lease, and give their land shares to others without the consent of any of the other members. Such rules should also provide that land share holders have the right to withdraw their land share in kind without the consent of other common owners.

**Potential Impediment: Legal rules governing common property resources have not yet been developed or have been “over-privatized.”**

#### **Potential Solutions**

- Avoid, or at least proceed cautiously in, introducing private ownership rights to common property resources.
- Design legal ownership and use rules for common property resources that incorporate the following:
  1. Clearly defined boundaries;
  2. Clearly defined rightholders;
  3. Congruence between appropriation rules and local conditions;
  4. Participation in governance by individuals affected by the rules;
  5. Monitors who actively audit the conditions of the land and the behavior of the community;
  6. Graduated sanctions imposed by other appropriators or by officials who are accountable to appropriators or both;
  7. Rapid access to low-cost conflict resolution; and
  8. Rights of appropriators to devise their own institutions unchallenged by external governmental authorities.

# ***Land Privatization***

**Potential Impediment: Prohibition of private land ownership.**

**Potential Solutions**

- Amend the constitution or relevant law to provide for private ownership as one of the forms of ownership.
- If private ownership will not be constitutionally or otherwise allowed, allocate secure, long-term, transferable use rights to private parties.

**Potential Impediment: Failure to allocate full ownership rights during privatization.**

**Potential Solution**

- Laws governing privatization of land into “ownership” should provide for a transfer of secure, long-term land rights to private parties. The ownership rights should include the rights to control, use, alienate, and enjoy the fruits of the land.

**Potential Impediment: Transfer of rights that are substantially less than full ownership.**

- Eliminate lifetime inheritable possession and non-alienable permanent use as forms of tenure to be prospectively allocated by the state.
- Convert into ownership by operation of law all long-term rights to use land (regardless of the tenure form) held by private individuals that had been allocated by the government. If the individual has already received land free of charge and an additional free grant is inappropriate from a policy perspective, the land could be transferred free of charge only after being cultivated by the individual for a set period of time. For ECA countries that forbid private ownership of land, such rights could be converted into long-term leases (or long-term use rights) that are fully alienable upon the sole discretion of the rightholder.
- Government land currently allocated for short-term use could, upon expiration of the short-term rights, be privatized in a process that awards the land to the highest bidder, such as an auction. Alternatively, if the policy decision is made that such land should be transferred to the private party cultivating the land, that party could receive ownership free of charge, for a determined monetary amount, or upon fulfillment of certain conditions.

- Legitimate state interests, such as management and protection of land, can be properly addressed through appropriate land use regulation (see checklist on land use regulations).

**Potential Impediment: State land funds are large and land is not being rapidly transferred to private owners or users.**

#### **Potential Solutions**

- Land already allocated in long- or short-term use rights could be privatized under one of the methods described in the preceding impediment/solutions item.
- Land held in land funds that is not already allocated in long- or short-term use rights could be privatized through a process that awards the land to the highest bidder, such as an auction.

**Potential Impediment: Land used by certain farm enterprises is exempted from privatization.**

#### **Potential Solutions**

- The categories of specialized agricultural enterprises exempt from land privatization could be strictly limited to those considered essential to be under public control, and only that land on specialized enterprises actually used for the limited essential public purpose could be exempted. All other land could be privatized in a timely manner in accordance with the prevailing land privatization law.
- Limit the role of local administrations in awarding exemptions, and subject all exemptions to review at the central government level for conformity with the legal standards established for the exemption.

**Potential Impediment: Lack of incentives provided to regional and local governments to support land privatization.**

#### **Potential Solutions**

- Provide by law that all or a great majority of revenues from privatization of land owned or controlled by provincial or local governments should be retained by the local government or shared between the local and provincial government. Alternatively, provide by law that all or a great majority of revenues from privatization of land, whether owned or controlled by local, regional, or national

government, should be retained by the local government or shared between the local and provincial government.

- Institute a land tax system that will, over time, allow local government to collect and retain revenue from the local land base (see checklist on land taxation).

**Potential Impediment: Lack of clarity over which level of government controls land subject to privatization.**

**Potential Solutions**

- Law and regulations could provide a clear and timely process for determining what level of government owns particular parcels of land, or what level of government has authority to privatize particular parcels of land.
- The federal government could cede any authority it may have over agricultural land to local governments for privatization purposes. This cession of authority could expire at a date certain.

## ***Land Restitution***

**Potential Impediment:** Parcels claimed in-kind must be issued titles and registered before transactions can occur.

### **Potential Solutions**

- Revise regulations to allow expedited treatment for potential sellers in return for a fee.
- For those claimants who are unable to receive their property within its original physical boundaries or whose boundaries are disputed, limit compensation to voucher or financial compensation instead of land in-kind.

**Potential Impediment:** Arable land held by urban dwellers is not being used or transferred due to titling or approval requirements.

### **Potential Solution**

- Revise law to encourage or provide incentives for long-term leases for restituted owners who cannot or will not sell their land and do not intend to farm it. The law can also provide that land with disputed claims can be leased, identify a priority list for potential lessees, and grant lessees preemptive rights to purchase the land after the disputed claims are resolved.

## ***Farm Restructuring***

**Potential Impediment:** Land on restructuring collective and state farms is not being transferred to the ownership of individuals.

### **Potential Solution**

- Allocate land share rights to workers, pensioners, and social-sphere workers associated with former state and collective farms.

**Potential Impediment:** Land share transaction rights do not encompass the complete range of possible transactions in land.

### **Potential Solutions**

- Adopt legislation giving all owners of agricultural land and land shares the legal right to buy, sell, lease, mortgage, gift, and bequeath their land rights.
- Land legislation should generally apply to land shares as well as land plots, except when special provisions unique to land shares are needed.
- A land share should be legally transferable to all citizens, not just to those currently working on the enterprise where the share is located. If enterprise workers are given a preference in acquiring shares, this advantage should be limited to a right of first refusal to meet outside offers, and clear legal substantive and procedural rules should be developed for exercising the right of first refusal..
- The law should prevent the loss of land share rights when a decision on disposition of a land share has not been formally made. The present user (the collective) should continue to use the land until the holder chooses to make a disposition or claim the land in kind.

**Potential Impediment:** The rules for allocation of land shares in kind do not ensure that shareholders receive land of average quality and location.

### **Potential Solutions**

- Provide in law that land should be available for withdrawal from the entire area of land indicated on the land share certificate, not limited to a minor portion of that land.

- Provide in law that withdrawability of a land share is a land transaction right which may be exercised at the discretion of the land share owner.
- Develop a simple legal procedure using objective rules that gives a withdrawing land share owner or his transferee a reasonable chance of receiving land of average quality and location.

**Potential Impediment: Contributions of land shares to enterprise charter capital funds are irrevocable.**

#### **Potential Solutions**

- Prohibit irrevocable capital contributions of land, while allowing leases or short-term contributions of use rights
- Allow irrevocable capital contributions of land, but with safeguards. These safeguards could include requiring bi-lateral contracts for contributions, forbidding the use of multi-lateral contracts for contributions, attaching a warning on the standard contribution contract, and a requirement that the contract be notarized.
- Allow land share owners who contribute their land shares to an agricultural enterprise to terminate the contribution at any time, or (conceptually different but in practice the same) to leave the enterprise with equivalent land at any time.
- Limit the contribution of land shares or temporary use rights thereof to an agricultural enterprise to a maximum period of three years.

**Potential Impediment: Long term lease of land shares to large agricultural enterprises may lock up land in inefficient production units.**

#### **Potential Solution**

- Limit the term of land share leases to three years, until land share owners have a more equal bargaining position in relation to the enterprises.



**Potential Impediment: Lack of demarcation of land shares on the ground hinders withdrawal of land rights for private farming.**

**Potential Solutions**

- Adopt legal provisions for issuing land share certificates, with the corresponding land parcel indicated on a map. Demarcate parcels only when a land share owner wants to withdraw his land share in kind.
- Issue certificates identifying the land share right in the vicinity of the owner's village, rather than somewhere on the territory of the entire former collective farm.

**Potential Impediment: Lack of legislation to directly reduce farm size.**

**Potential Solutions**

- Eliminate legislative provisions favoring retention of large agricultural enterprises.
- Establish maximum sizes for landholdings of a single farming operation. Maxima for private farms and large enterprises could be set using parallel criteria.
- Develop a legal framework that would allow government to alter debt restructuring or write-down for deeply indebted large enterprises in return for breakup into smaller units.

# ***Land Use Regulation***

**Potential Impediment:** Lack of appropriate legal rules governing land use.

## **Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing land use (for a checklist of items to be included in such legislation, see section V of Chapter 6, *Land Use Regulation*).

**Potential Impediment:** Land is confiscated for irrational use or non-use.

## **Potential Solutions**

- Rely on market incentives to generally propel agricultural land to its highest and best agricultural use with few state controls.
- Legal provisions to facilitate the leasing-out of agricultural land that is unused or inefficiently cultivated could promote productivity without eliminating the ownership rights of the landowner. The lease should only be mandated after local government assistance has been provided and sufficient notice has been given to the landowner. Voluntary leases are preferable. The lease should be short-term, or else terminable (after an initial guaranteed period) at the landowner's option when he is prepared to resume farming the land, and the lease payment should go to the landowner.
- Legal provisions requiring a forced sale only after formal notice, an opportunity to rectify, and a prior opportunity to lease would minimize the outright loss of property. Proceeds of the sale should go to the landowner.
- Where a lack of routine maintenance or other minor omissions create the irrational use, legal provisions allowing government action and a service charge levied on the landowner can provide for a reasonable solution.
- Protect against particular types of undesirable use that are unlawful by enacting specific regulations that reasonably define objectionable uses and describe the related policies to be promoted by way of environmental regulations and comprehensive land use planning.

**Potential Impediment: Legal requirement to increase quality or productivity of soil.**

**Potential Solutions**

- Forego soil quality improvement regulation in its entirety and rely upon farmer self-interest to prompt such improvements.
- Where farmers need information and guidance as to soil management, provide government sponsored and funded programs to teach these skills in soil improvement.
- Promulgate clear guidelines as to soil management and quality subject to fines for gross violations only.
- Monitor soil quality and condition pursuant to specifically defined use regulations and standards for fertilizers or other inputs. Where violations rise to the level of pollution or contamination, impose appropriate legal sanctions. Where violations fall short of this level, withhold government financial aid.
- Adopt legal enactments allowing the government to charge the landowner for government action required to ameliorate soil, or to repair damages to public property caused by soil erosion. Such government action should only be allowed in severe cases and only after the landowner has been given adequate time and notice to correct the condition.
- Condition receipt of public agricultural benefits, including subsidy payments, participation in soil and water quality programs, and tax incentives, on compliance with soil quality standards.

**Potential Impediment: Overly severe penalties for land use violations.**

**Potential Solutions**

- Eliminate the prospect of land confiscation as a legal penalty for non-compliance with land use laws.
- Provide in law for appropriate notice and process mechanisms before levying fines, forcing sales, or forcing leases.
- Allow landowners the opportunity to work with public agricultural support entities to devise and implement a compliance plan before levying penalties.

**Potential Impediment:** Converting agricultural land to non-agricultural uses is severely restricted.

**Potential Solutions**

- Allow construction of agricultural or residential structures on agricultural land.
- Develop land use planning, zoning, and permitting regulations that reasonably promote the policy of preserving agricultural land and uses without prohibiting non-agricultural use outright. These may include non-exclusive agricultural zoning approaches, creation of transferable development rights, and other measures. A neutral agency should administer land use regulations.
- To the extent that legal prohibitions on converting some agricultural lands to non-agricultural use do exist, do not apply the prohibition or apply more flexible regimes to areas designated as urban, urbanizing, or peri-urban.
- Craft tax regulations that serve to encourage (or at least do not penalize) farmers or agricultural uses.
- Establish districting opportunities whereby members can avail themselves of member benefits in exchange for commitments to keep land under cultivation or otherwise in agricultural use.
- Promote the development of appropriate industry, infrastructure, and social service delivery in agricultural/rural areas as a means of retaining agricultural populations and preserving agricultural uses.
- To the extent that governments are concerned that non-agricultural uses will interfere with agricultural uses, enact "Right-to-Farm" laws to limit nuisance claims or other civil suits by non-agricultural landowners.
- Adopt regulations that require permission from local government to establish and operate agricultural enterprises that are likely to be a nuisance. The process requires notice and public hearings. Once the agricultural use has obtained a permit, deem that its operation cannot be contested.

## ***Land Transactions***

**Potential Impediment:** Legal provisions allow -private ownership without the legal right to sell.

### **Potential Solutions**

- Adopt legal rules that expressly allow the right to buy and sell land, including agricultural land.
- Where lease or use rights are given instead of full private ownership, adopt rules that expressly allow the right to buy and sell these rights.

**Potential Impediment:** Moratoria on land sales transactions postpone the development of a land market.

### **Potential Solutions**

- Remove legal provisions that require or allow moratoria on all sales of agricultural land.
- Remove legal provisions that require or allow moratoria on sales, except for short moratoria on land recently privatized (except no moratoria on land purchased from government, obtained as restitution, or representing land share rights).
- Remove legal provisions that require or allow moratoria on all sales, but implement laws that impose a higher tax on profit from sales of land and other assets recently privatized, or even more broadly covering land recently purchased in private transactions.
- Moratoria, if applied, should be no longer than five years.

**Potential Impediment:** A lack of legal procedures and standard forms for exercising transaction rights hinders execution of legal rights.

### **Potential Solution**

- Adopt procedural rules for carrying out transactions, along with model or standard contracts.

**Potential Impediment: A prohibition on foreign purchase of agricultural land may limit agricultural financing.**

**Potential Solution**

- Allow foreign citizens or entities to acquire use or lease rights to agricultural land or to obtain ownership through a joint venture.

**Potential Impediment: Restrictions on transferring agricultural land attempt to ensure continued use for agriculture.**

**Potential Solutions**

- Remove all legal provisions that require or permit agricultural use restrictions in transactions, and address any concerns through zoning and land use law.
- Remove legal requirements that buyers of agricultural land must be farmers, thereby expanding the pool of potential buyers.

**Potential Impediment: Land leasing is restricted.**

**Potential Solutions**

- Eliminate legal restraints on leasing out land plots.
- Implement rules for leasing land shares that set short maximum time periods and minimum percentage rents, or the option of early termination by the lessor.

**Potential Impediment: Priority rights to acquire land parcels, such as rights of first refusal, complicate land transactions.**

**Potential Solutions**

- Adopt rules that eliminate broadly-applied priority rights to acquire land parcels in private transactions.
- If there are to be priority rights to certain types of land as a matter of law, restrict them to a specifically defined group and promulgate workable procedures for exercise and termination of the rights.

**Potential Impediment: Financial penalties for early sales may hinder the development of an effective market.**

**Potential Solutions**

- Implement a tax law that provides for staggered rates on land sales profits, so that the rate charged is in inverse proportion to the length of ownership.
- Adopt a capital gains tax law that applies uniformly to profits from sales of all assets, including, but not limited to, farmland.
- Whether implementing a specific tax on profits from farmland sales or a capital gains tax that applies uniformly to all assets, consider an exclusion from or reduction in profits tax rates for profit earned on sales of farmland sold to close relatives.

**Potential Impediment: High transfer taxes may reduce efficient transactions.**

**Potential Solutions**

- Enact legislation that imposes transfer taxes or stamp duties at a moderate level, somewhere between one and three percent.
- Exempt small transactions, setting the exemption level around the typical value of a household auxiliary plot.
- Ensure that transfer taxes for land are no higher than those imposed on transfers of other assets.

**Potential Impediment: Nominal lease rates for government owned land may undercut the private lease and sales markets.**

**Potential Solutions**

- Adopt rules allowing land that is being leased from the government at very low rates to be transferred in ownership to the users free of charge, or for a nominal rate.
- Adopt rules allowing land to be sold to the highest bidder through a series of auctions, organized so that the land would be presented for privatization over time, rather than being dumped at very low prices.

**Potential Impediment:** Maximum size restrictions may favor currently existing large collective farms to the detriment of a new private market in farmland.

**Potential Solutions**

- Avoid maximum size restrictions for land acquired through private transactions.
- If maximum size restrictions are to be established, they should be: applied to private farms and legal entities using parallel criteria; and should be set far above the average farm size of the region where the land is located.
- Maximum size restrictions may be appropriate in limited situations to reduce the size of cosmetically reorganized collective and state farms. See Chapter 5, *Farm Restructuring*.

**Potential Impediment:** Minimum landholding size requirements may prohibit the market from allocating land to its most profitable use.

**Potential Solutions**

- Set no legal minimum landholding requirement for land acquired through private, voluntary transactions.
- If minimum size restrictions are to be established, they should be: lower than the size of the smallest land share, to permit land share owners to start private farms; and should not be targeted at private farms.



# ***Mortgage***

**Potential Impediment:** Insufficient legal rules govern mortgage.

## **Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing mortgage (for a checklist of items to be included in such legislation, see section V of Chapter 8, *Mortgage*).

**Potential Impediment:** Lack of land tenure security or lack of transferable land rights may make it impossible to mortgage land.

## **Potential Solutions**

- As a matter of positive law, provide for secure land tenure, permit free transfer (at least over a wide range of situations), and specifically provide that agricultural land can be used as collateral.
- Avoid regulations that indirectly threaten security, limit transferability, or hamper mortgage.
- Develop a public institution to provide subsidies to borrowers who want to start peasant farms or expand existing peasant farms. Depending on the particular country setting and circumstances, some of the risk to lenders might be absorbed by the public institution, which would act as a guarantor and an intermediary between the private lender and the borrower.

**Potential Impediment:** A lack of specific mortgage regulations and forms may retard mortgage practice.

## **Potential Solution**

- Adopt specific procedures and forms (including model contracts) in or pursuant to the mortgage law that expressly define protocols, rights, and responsibilities. Liberally adapt and adopt the frameworks and models that are used by other countries. Use standardized procedures and forms to the widest extent possible.

**Potential Impediment:** Limitations on the types of land that can be mortgaged, the valuation of the land, or the purposes of the mortgage loan may inhibit the development of credit.

**Potential Solution**

- Forego such regulations in their entirety; rely instead upon credit and land market supply and demand to control mortgage activities.

**Potential Impediment:** Lack of express authorization for purchase money mortgages may exclude buyers who lack funding to make cash purchases.

**Potential Solution**

- Explicitly allow purchase money mortgages in law and facilitate their use by establishing appropriate regulations and procedures.

**Potential Impediment:** Default and foreclosure rules regarding notice, opportunity to cure, penalties, and insurance are overly broad, overly restrictive, vague, or do not exist.

**Potential Solutions**

- Adopt clear and objective rules of appropriate scope regarding mortgage to define protocols, rights, and responsibilities (for a checklist of items to be included in such legislation, see section V of Chapter 8, *Mortgage*).
- Legally require that formal notice of default and the borrower's right to cure the default be sent to the debtor in case of default. Limit the number of times a borrower has a right to cure (three times overall, or once in 12 months).
- Provide in law that the creditor may accelerate the debt after giving the debtor a specific period of time to cure the default (such as 45 days).
- Provide debtors the legal right to pay off the mortgage debt up to or following the completion of the foreclosure procedures, but do not allow an extended period for post-foreclosure relief.
- Provide the original borrower the legal right to re-purchase the real estate at the price offered at the foreclosure sale.

- Provide for a long period of grace for overdue payments in law but allow a higher interest rate during the grace period.
- Allow the creditor and borrower to contract for the amount of time that will be allowed to cure a default. Allow the creditor to seek an injunction against the borrower for actions that may impair the property.

**Potential Impediment: Overly restrictive rules intended to protect mortgagors can lead to fewer mortgages.**

#### **Potential Solutions**

- Develop legal procedures that protect the livelihood of the farmer and his family during foreclosure, but establish a time lapse between default and foreclosure that is not excessively long.
- If the buyer at a foreclosure auction offers to lease or sell the real estate to a third party, the original mortgagor could be granted the legal right of first refusal to purchase or lease the real estate on the same terms.

**Potential Impediment: Overly restrictive rules intended to protect mortgagees may reduce land market activity.**

#### **Potential Solutions**

- Do not mandate the written consent of the mortgagee before the mortgagor can transfer the land (collateral), but, rather, allow the mortgage agreement to authorize (by way of a “due-on-sale” clause) the mortgagee to accelerate the debt if the mortgagor transfers the mortgaged real estate without the mortgagee’s consent.
- Provide in law that the creditor may ratify or refuse the new owner’s assumption of debt. If the creditor refuses, the original debtor is still liable for the debt.
- Provide that a third party transferee has the right to clear the transferred property of the mortgage by paying the creditor a specified (by the third party transferee) sum. Provide in law that the creditor may refuse the payment and sell the property at public auction for at least ten percent higher than the offered sum. In ECA settings where there are existing substantial uncertainties affecting the land market, this approach may go too far in discouraging mortgagees.

**Potential Impediment:** Fear of bank ownership of land and resulting land speculation may lead ECA countries to prohibit banks from purchasing land at foreclosure sales, severely limiting the banks' options and discouraging mortgage loans.

**Potential Solution**

- Place appropriate restrictions on the ability of banks and other mortgage lenders to own land where the ownership is acquired as a result of the land's use as collateral for a loan by that or any other lender. Limit duration of permitted ownership to the period needed to dispose of foreclosed collateral (two-five years).

# ***Land Registration***

**Potential Impediment:** Legal rules governing land registration are insufficient or nonexistent.

## **Potential Solution**

- Develop specific legislation containing detailed rules and procedures governing land registration (for a checklist of items to be included in such legislation, see section V of Chapter 9, *Land Registration*).

**Potential Impediment:** The land register does not provide conclusive evidence of title.

## **Potential Solutions**

- Adopt a system of registration of title, in which the registry reflects conclusive evidence of title, instead of registration of deeds in which title is not conclusive.
- Legal provisions governing registration should explicitly state that the land register is conclusive evidence of title.
- Even under a registration of deeds system where the register does not contain conclusive evidence of title, the register should contain enough information, and be organized in a fashion (for example, with a parcel or “tract” index, and not just a grantor-grantee index) so that it is relatively easy to determine the state of title for each parcel in the register.

**Potential Impediment:** The legal status of unregistered land rights and restrictions is unclear.

## **Potential Solutions**

- Laws governing registration should include a specific list of rights and restrictions that are legally valid even if not registered.

Laws governing registration should include an explicit provision that land rights that arose prior to the registration law’s effective date remain legally valid. The law should also provide or recognize a process to bring such rights within the newly created registration system.

**Potential Impediment: Slow registration and titling processes delay land market development.**

**Potential Solutions**

- Laws governing registration should establish time limits for actions by all registration officials, with suitable penalties for failing to meet such time limits.
- Maintain adequate registry personnel to process transactions.
- Mandating the use of standardized forms in all land register transactions increases the speed of the registration procedure while simultaneously reducing the possibility of mistake.

**Potential Impediment: High registration fees discouraging landowners from registering land or transactions.**

**Potential Solutions**

- After a land registry has been established, registration fees should be set at a fixed, low level to help support the operation and maintenance of the system. The goal should be to establish an administrative system that is economical enough to break even while keeping fees at a level that will not discourage transactions or registration of transactions. Such fees may be based on the land value so that bigger transactions subsidize smaller ones, or they may be on a fixed basis.
- Limiting the information contained in the registry to that which is absolutely essential, such as parcel descriptions, ownership, and other interests in the immovable property, will also help to minimize costs and keep registration fees low.

**Potential Impediment: Institutional shortcomings include no clearly identified registration agency, lack of inter-agency coordination, and lack of institutional capacity.**

**Potential Solutions**

- Legal provisions should clearly specify the powers and responsibilities of all agencies involved in land registration. Ideally, a single, central agency providing policy and direction in land and property systems should be given responsibility for the establishment and maintenance of the land registration system.

- Legal provisions should require all government agencies to deliver files requested by the registration agency in a timely manner.
- A system should be developed and enacted into law under which the registration agency is automatically informed of all transfers or successions handled by courts, notaries, and local and central authorities. This is especially important in the case of inheritance, as there is otherwise a significant risk that such changes in ownership will not be reported. Likewise, it would be helpful if the taxing authorities notified the registrar of all tax liens placed on land, so the registry office could contain a list of all such liens for notice purposes only.

**Potential Impediment:** The public does not have access to land registry information.

#### **Potential Solutions**

- The registration law should require the registry information to be open to public inspection and otherwise available to the public without significant delay.
- The workings of the land register should also be simple enough that members of the general public can easily ascertain all relevant information from the register upon inspection. Any fees for provision of assistance should be low and limited to covering direct costs.

**Potential Impediment:** Requirements for legal land descriptions and land surveys are complex and burdensome.

#### **Potential Solutions**

- The choice among land description requirements and related surveying methods should be based on what is economical, necessary, and likely to facilitate a land market with comprehensive coverage of all or nearly all land parcels rather than on what is technologically possible.
- The desired level of accuracy for land descriptions should be such as to enable the boundaries to be relocated in cases of dispute or uncertainty, enable subdivision to take place within or up to the limit of the existing parcel, and (for a multi-purpose cadastre) enable planners and assessors to calculate areas. Lesser levels of accuracy are likely to be needed for agricultural lands than are needed in urban settings.

**Potential Impediment:** Lack of liability rules or reliable compensation for losses caused by government error in registration limits the effectiveness of a registration system.

**Potential Solutions**

- Registration laws should specify the situations when the state will be liable for material mistakes made by the registration agency.
- Registration laws should provide for the creation of a state assurance fund to compensate parties who suffer damages due to mistakes by the registrar.
- The law should further contain procedures for claiming compensation from the fund and the type of compensation for which the claimant is eligible.



## ***Land Taxation***

**Potential Impediment:** Legal rules governing land taxation are insufficient.

**Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing land taxation (for a checklist of items to be included in such legislation, see section V of Chapter 10, *Land Taxation*).

**Potential Impediment:** A lack of available market information hinders accurate land valuation.

**Potential Solutions**

- Enact legislation that establishes a land registry or cadastre to record property information; and makes all information available to tax valuation officials.
- Implement regulations which provide for the use of data from public land rights auctions to develop benchmarks for market values.
- Enact legislation requiring taxpayers to provide property data by self-declaration in a sworn statement.

**Potential Impediment:** Resources are insufficient to conduct accurate valuation.

**Potential Solutions**

- Implementing regulations could establish land valuation categories based on location and average land values (or average presumptive land values) per area.
- Legislation could provide for the use of updated versions of the Soviet-era area-based valuations.

**Potential Impediment:** Under-reporting of land prices distorts tax base information and creates inequities.

**Potential Solution**

- Tax legislation should require that sale price information (reported in registering land transactions) be used for both land tax purposes and for establishing the cost basis for capital gains calculations. Taxing entities should publicize to buyers that an understated purchase price will cost them higher taxes on resale.

**Potential Impediment: Land tax valuations based on only one or two factors (such as area or soil) are inaccurate and often out-dated.**

#### **Potential Solutions**

- Land tax legislation could base valuations on actual market values, if markets are functioning.
- Land tax legislation could base valuations on approximations of market value determined by a combination of factors such as area, productivity, and proximity to points-of-sale.
- Land tax laws could base valuation on the “presumptive income” of the land area, determined by land quality and, in some instances, location.
- Land tax legislation could establish updated area-based valuations initially and provide for transfer to market-based valuations when information becomes available.
- Laws and regulations could establish periodic and frequent (one to four year) re-valuation cycles.

**Potential Impediment: Tax revenue is not retained by local governments.**

#### **Potential Solution**

- Tax law can provide for retention or distribution of land tax revenues to local governments on the bases of need and revenue production capacity. While the criterion of need can play some role in the allocation process, the link to local revenue production capacity should be tight enough to ensure both local motivation to collect and locally visible results.

**Potential Impediment: Unclear spending responsibilities and lack of local expenditure discretion create problems for tax revenue distribution.**

#### **Potential Solution**

- Adopt clear written rules to guide use of the locally retained or allocated land-tax revenue. Include proper subjects for local government spending in the tax code and regulations. Clarify legislation and policy defining local government spending responsibilities.

**Potential Impediment: Over- taxation distorts the agricultural land market and may incur negative social or economic repercussions..**

#### **Potential Solutions**

- Enact legislation establishing the land tax at a low to moderate rate. The importance of getting a land tax off the ground by beginning with modest rates outweighs any danger of speculation caused by low tax rates, at least in the initial stages of land market development.
- Anticipate and avert political barriers to future rate increases by establishing sunset provisions in the tax law that clearly set forth the authority of the taxing entity to increase the rates.
- Legislation could permit payment in kind as well as cash if circumstances warrant.
- Balance rate flexibility and stability by adopting legislation that allows for rate variation within specified parameters. Legal authority to set parameters could rest with regional or national government, while local governments could retain the authority to vary the rates within these parameters.
- Adopt legislation setting forth tax preferences to control the impact of high taxes on farm land. These can be granted via property taxes, income taxes, or reduced taxes on farm equipment and personal property used for farming. (See cautionary note on preferences, following.)

**Potential Impediment: Numerous and complex exemptions or preferences for agricultural land.**

#### **Potential Solutions**

- Limit exemptions in the land tax law; alleviate completely where possible.

- Legislation should abolish discretion of local tax officials to alter the tax base through categorical or individual changes in exemptions.

**Potential Impediment: Inadequate legal and regulatory measures for collection and enforcement.**

**Potential Solutions**

- Consider reforms to the land tax laws and regulations that prioritize a “collection-led” approach, rather than a “valuation-led” approach.
- Adopt clear written procedures for collection and enforcement to ensure adequate revenues and enacting legislation to establish the requisite administrative organization.
- Where there are both passive rightholders and actual users, provide in the tax law that the actual user bears responsibility for the land tax and that the passive rightholder cannot lose her rights due to nonpayment.

**Potential Impediment: Low or non-existent inheritance tax**

**Potential Solutions**

- Through tax legislation, institute a moderate inheritance tax on land, but only do so after land markets are functioning and land rights are clearly perceived to have a value.
- Establish in the laws a uniform exemption for a certain value of the total estate. This would balance the concerns arising from favorable inheritance tax treatment of agricultural land (i.e., use of land as an estate planning tool, resulting in speculation) with the concerns arising from application of an inheritance tax on farmland in the absence of a functioning land market (i.e., refusal of inheritance leading to reversion of land to the state).
- Create a system of preferences in the inheritance tax law based on land-area, land-use, and category of heir. Exempt any amount of land within area limits of what used to be “free distribution” if heir is either a family member or another member of a collective farm. If heir is neither but land is within “free distribution” size limits, subject the property to a very low rate and allow payment in-kind.

# ***Compulsory Acquisition of Land***

**Potential Impediment:** Appropriate legal rules governing compulsory acquisition of land do not exist.

## **Potential Solution**

- Develop specific legislation containing appropriate, detailed rules and procedures governing compulsory acquisition (for a checklist of items to be included in such legislation, see section V of Chapter 11, *Compulsory Acquisition*).

**Potential Impediment:** The purposes for which land may be acquired have not been clearly identified. **Potential Solutions**

- Allow compulsory acquisition of land only where it serves public purposes.
- The scope of the public purposes doctrine can be defined through broad guidelines supplemented by judicial interpretation or through list provisions. If list provisions are employed, individual countries must determine whether the list provided should be relatively exclusive or non-exclusive. In areas where insufficient administrative capacity or the presence of corruption might contribute to excessive land takings, exclusive lists should be employed. Where administrative capacity is strong and corruption is not a substantial problem, however, non-exclusive lists may be more appropriate.

**Potential Impediment:** Legal standards for compensation are inadequate.

## **Potential Solution**

- Legislation governing compulsory acquisition should specify detailed standards of compensation to be paid.

**Potential Impediment:** The compensation standard results in less than market value.

## **Potential Solutions**

- Legislative provisions should ensure that full market value is the basis of compensation for all land expropriations.

- In the absence of a fully developed land market, the true market value of any particular piece of land may be difficult to determine. In such settings, alternative approaches to determining and providing compensation may need to be included, such as the capitalized value of rents, the net value of production, or providing comparable land as compensation.
- Some countries, including several ECA countries, have adopted compensation levels that pay a premium above and beyond the market value of the land, such as lost profits. These actual losses may be difficult to accurately measure, but their payment will increase farmers' tenure security and encourage productive uses of agricultural land.

**Potential Impediment:** Agencies authorized to acquire land are not clearly identified.

**Potential Solution**

- Implementing regulations should specifically identify those government levels and agencies that have authority to acquire land and provide penalties for agencies that attempt to acquire land beyond their administrative power.

**Potential Impediment:** The procedural rules governing compulsory acquisition are unclear.

**Potential Solution**

- Implementing legislation should include detailed guidelines governing compulsory acquisition procedures. Although specific provisions may vary, all procedural guidelines should, at a minimum, ensure notice to all affected land right holders, an opportunity to be heard, and the right to appeal.

**Potential Impediment:** Compulsory acquisition rules or practices are unpredictable.

**Potential Solutions**

- Regional or local governments planning to expropriate land should be legally required to submit the following items to central (or at least next-higher level) officials prior to final approval of the expropriation: (1) a detailed plan for expropriation, including the amount, location, and proposed purposes for the land to be expropriated; (2) responses to any objections raised by affected land right holders during the

expropriation process; (3) proof that all procedural requirements established in law have been satisfied; and (4) certification that compensation has been paid to all affected land right holders.

- In settings of high population pressure on land, there could be a complete ban on state acquisition of high-quality agricultural land for any non-agricultural purpose, or at least a requirement that approval for the acquisition must be obtained at a very high level of the central government.

## ***Women and Land***

**Potential Impediment:** Land titles or other legal documents are issued or registered on a household basis.

### **Potential Solutions**

- Include community property law in the legal framework, establishing by law that all property acquired by either spouse during marriage, except by gift or inheritance, is "community" property.
- Require in law that all adult members of a household who hold land in common ownership be listed in the register.
- Provide in law for co-management and equal power over concurrently owned property. Each spouse can use and enjoy all property in co-ownership. One spouse alone might be provided with enhanced powers of management when the other spouse leaves, disappears, or becomes incompetent to act as a property manager.
- Enforce fair and equitable property management of co-owned property by providing that either spouse may be liable to the other for mismanagement of the property or allow recourse to the courts if either spouse jeopardizes the family's best interest in the course of property management.

**Potential Impediment:** Family businesses, including family farms, may not be considered to be in co-ownership of both spouses.

### **Potential Solution**

- Establish a legal presumption that family businesses and family farms are held in common ownership to be divided equally upon separation.

**Potential Impediment:** Members, including female members, of a peasant farm are unable to leave the farm with land and property in-kind.

### **Potential Solutions**

- Give departing members of a peasant farm the legal option of receiving their share of land and other assets in kind, instead of monetary compensation.



- Establish a legal rule that provides that spouses may always divide land held in common ownership regardless of minimum land size requirements.

**Potential Impediment:** Division of property at the time of divorce may make it economically difficult for one or both spouses to function independently.

**Potential Solution**

- Establish a legal presumption that family business and family farm property will be divided so that each spouse will receive a mandatory minimum share of the total estate or of all immovable property. Permit the mandatory minimum share presumption to be overridden only with the written consent of each spouse.

**Potential Impediment:** Written consent is not required for land transactions when land is held in common ownership.

**Potential Solutions**

- Legally require that both spouses consent in writing for all transactions (lease, sale, mortgage) that involve land, household necessities, and other specified assets.
- Give both spouses equal legal rights to community property by requiring signatures of both spouses to transfer or encumber community property.
- In all cases of common ownership (not only community property) require written consent by all common owners to transfer or encumber land.

**Potential Impediment:** Rules regarding inheritance of land may be inadequate or conflicting.

**Potential Solutions**

- Establish by law a default inheritance provision, which provides that, upon death, each spouse may pass all his or her separate property and one-half of the community property or co-owned property through a will, with the other half going to the surviving spouse. If the spouse dies without a will, all community property or co-owned property might be transferred to the surviving spouse.
- Adopt legal inheritance rules that do not on their face require gender equality or gender preference, but rather allow individuals to choose how to distribute their

property. At the same time, adopt statutory rules providing a "forced" minimum share for spouses.

- Enact legal rules for distribution of land previously owned by state or collective farms that require land to be distributed equally to all members of the state or collective farms, and, if children of members also qualify for distribution, equally to all children.
- Establish a legal rule that a spouse or descendant who has been farming the land that is passed through inheritance can acquire the whole farm as against the non-farming beneficiaries, but must pay the other beneficiaries an amount equal to the value of their share of the farm.

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